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MANUAL OF CONVEYANCING.

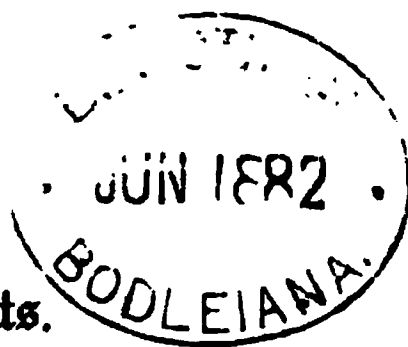
A
MANUAL OF CONVEYANCING
IN
THE FORM OF EXAMINATIONS
EMBRACING BOTH
PERSONAL AND HERITABLE RIGHTS.

BY THE LATE
JOHN HENDRY,
WRITER TO THE SIGNET.

WITH
THE NOTES ADDED TO THE SECOND EDITION
BY
JOHN T. MOWBRAY,
WRITER TO THE SIGNET.

THIRD EDITION,
REVISED BY
JOHN PHILP WOOD,
WRITER TO THE SIGNET.

For the Use of Students.



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PREFACE TO THE THIRD EDITION.

IN the present edition the new matter has been inserted in the text, and distinguished by square brackets. Several questions and answers have been deleted, as rendered obsolete by recent legislation, and not possessed of historical value. Some new questions and answers have been added. Mr. Mowbray's excellent notes, except, of course, those relating to answers not inserted in this edition, have been retained. The references to Bell's Commentaries have been altered to the corresponding pages of the last edition (MacLaren's). The references, in this edition, to the Juridical Styles, Vol. I. are to the fifth edition of that volume. It has not been thought necessary to give references to Professor Montgomerie Bell's Lectures, as parallel passages in that work can be readily found by aid of its complete index.

I am much indebted to my friends, Mr. W. D. Thorburn, Advocate, and Mr. Matthew Livingstone, one of the Assistant Keepers of the Register of Sasines, for the valuable aid they have afforded me.

J. P. W.

1st November, 1881.

PREFACE TO THE SECOND EDITION.

IN preparing for publication the present Edition of the late Mr. Hendry's "Manual of Conveyancing," the text, except in a very few instances, which are mentioned where they occur, has been printed as in the former one—the additions which were thought necessary, in consequence of decisions of the Court or of statutory changes in the law, being made in separate notes. In reprinting the original notes of authorities, references to the corresponding passages in the fifth edition of Professor Bell's Commentaries and in the third edition of Professor Menzies' Lectures have been added (within parentheses), which may be found useful; and the numbers of the sections of Mr. Dickson's Treatise on the Law of Evidence (second edition) have been substituted for the references to the volume and page. Wherever Professor Bell's Commentaries are cited in the additional notes, the reference is to the fifth edition. In connection with this part of the work, I have much pleasure in acknowledging the valuable assistance which I have received from my friend Mr. Charles Rampini, Advocate, who compared and corrected the original notes

of authorities, and added the references to the third edition of Professor Menzies' Lectures.

In the preface to the first edition of the work, the Author observed that it was "by no means intended to supersede the necessary labour of reading up the decisions and text-books from which it is compiled;" and while desiring to impress on all students the importance of that observation, I would add, that in reading the authorities, they should go beyond the mere facts of the cases, and endeavour to extract the principles on which the rules applied to them rest, as the only way of making them available as guides in practice. I venture further to suggest, *1st*, that in studying the system of Feudal Titles and Conveyancing, they should trace it through its whole course, and that they should not only master the principles on which it was based, and which still regulate it, but should also make themselves familiar with the styles and forms in which those principles were, previously to the recent statutory changes, embodied and applied, as being at once an interesting subject of inquiry, and the best, if not the only way of acquiring a thorough knowledge and understanding of the present system of deeds and writs, so as successfully to adapt them to the various cases that occur in practice; and *2nd*, that while, to enable them to judge of the legal import and effect of every deed that may come before them, they should endeavour to make themselves acquainted with all the rules and authorities as to the construction of deeds, not omitting the interpretation that has been put on obscure and ambiguous language found in

them, they should ever remember that the great aim and object of the Conveyancer in the framing of deeds should be to express clearly and aptly the intention of the granter, and thereby as far as possible prevent questions regarding them. For this purpose more or less care will be required, according as the objects and provisions of the deed are more or less extensive and complicated or dependent on contingencies; but with a due amount of professional skill, the use of a distinct and natural style of phraseology, and, where necessary, of appropriate technical language, the object may generally be attained.

I am indebted to Mr. A. Ellison Ross, S.S.C., of the Auditor's Office, for the preparation of the Index.

I cannot conclude without expressing my admiration of the ability, industry, and great extent of information displayed in the "Manual," and my regret that the Author, who was so early cut off, just when he seemed to be entering on a successful professional career, had not lived himself to undertake the duty which I have endeavoured to discharge, of preparing the present edition for the press.

J. T. M.

EDINBURGH, 24th November, 1866.

TO

ALEXANDER MONTGOMERIE BELL, ESQUIRE,

WRITER TO THE SIGNET,

PROFESSOR OF CONVEYANCING IN THE UNIVERSITY OF EDINBURGH,

THIS MANUAL,

IN TOKEN OF RESPECT AND GRATITUDE,

IS, BY PERMISSION,

INSCRIBED.

PREFACE TO THE FIRST EDITION.

THIS Manual consists of the notes and *memoranda*, in an arranged and extended form, made by the author last session in preparing for the competitive examinations in the Conveyancing Class of the Edinburgh University; and, although it is by no means intended to supersede the necessary labour of reading up the decisions and text-books from which it is compiled, the hope is entertained that it will be found a useful auxiliary to the student in prosecuting his studies, and in preparing for the class examinations. In the use of the book, the student is recommended to have it before him from day to day during the Course, altering it in conformity with the latest decisions or statutes; and, at the same time, carefully correcting its errors and supplying its defects.

The benefits resulting from that excellent system of examination matured in the Conveyancing Class by the late Professor Menzies, and successfully carried on by his successor, Professor Bell, can scarcely be overrated; for, besides

affording the students the important advantage of individual communication with the professor, the examinations impose the necessity of close and careful study, and stimulate a degree of industry and rivalry which would be wanting if the professor were to content himself with simply reading his Lectures. It was the Author's desire of still further increasing the interest of students in these examinations that has led to the publication of this volume; and on that account he would venture to bespeak for it an indulgent reception.

EDINBURGH, *December*, 1859.

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A

MANUAL OF CONVEYANCING.

ERRATA.

Page 62, Ans. 120, line 3, *for* "is," *read* "it."

„ 266, Ans. 560, last line of paragraph (2), *for* "Declaration," *read* "Declarator."

„ 345, Ans. 736, *after* "warrant," *insert* "or."

The most ancient mode of authenticating deeds in Scotland was by the granter adhibiting the sign of the cross, which betokened a solemn resolution to abide by the writ, and was viewed as an amulet for preserving it from injury. Among the

¹ Ersk. 3, 2, 6; Menzies Lect. 70 (72).

² Park, M. 8449; and 5 Br. Supp. 539; E. of Hopetoun, 6th March, 1856, 18 D. 739.(a)

(a) In the opinion of Lord Curriehill in this case, Park is referred to as a leading authority.

B

Saxons, such persons as could sign also subscribed their names besides making a cross ; and the names of witnesses present were usually inserted at the close of the deed. The signature of the cross was succeeded by monograms, containing a combination of the letters of the parties' names with those of a tutelary saint ; and, afterwards, seals were introduced.¹

3. Give an outline of the history of the custom of sealing writs ; and by whom was the practice introduced into England ?

Several instances of the use of seals occur in the sacred writings. Royal mandates were thus authenticated in the East, for in the book of *Esther* it is said, that "the writing which is written in the king's name, and sealed with the king's ring, may no man reverse ;"² and in an account of the purchase of a field, in *Jeremiah*, the passage occurs, "I subscribed the evidence and sealed it, and took witnesses, and weighed him the money in the balances."³ From the East, the custom of sealing was introduced among the Greeks and Romans, and from the latter it was acquired by the Franks.⁴ William the Conqueror established this method of authentication in England, and it continued the sole method of attesting writings in that country till the reign of Charles II., when the Saxon custom of signing was revived.⁵

4. How was the authenticity of a sealed deed ascertained ?

The authenticity of a deed under seal was ascertained by comparing the seal with the impression ;⁶ and if the granter confessed in court that the impression was genuine, he was bound to warrant the writ and "to impute to his own evil keeping of the sele, gif he incurs ony damage or skaith throw the negligent keeping thereof."⁷ For the detection of frauds practised by the counterfeiting of seals, all freeholders were ordained, by the Act 1429, c. 130, to compear personally at the sheriffs' head courts, or send attorneys, with the seal of their arms.⁸

¹ Ross Lect. i. 123 ; Menzies Lect. 73 (75) ; Dickson Evid. i. 348 (§ 636).

² Esther viii. 8.

³ Jeremiah xxxii. 10.

⁴ Ross Lect. i. 123.

⁵ Menzies Lect. 74 (76).

⁶ Ross Lect. i. 124.

⁷ Reg. Maj. 3, 8, 4.

⁸ Ross Lect. i. 124.

5. When and for what reason was signing introduced as a solemnity of Scottish deeds?

The subscription of the granter was introduced as a solemnity by the Act 1540, c. 117, which proceeds upon the preamble:—
 “Becaus mennis seles may of adventure be tint, quhairthrow gret hurt may be generet to them that awe the samin; and that mennis seles may be feinzied or putt to writingis efter their deceis, in hurt and prejudice of our sovereign Lord’s liegis;” and enacts, “That therefore na faith be given in tyme cuming to ony obligation, band, or uther writting under ane sele, without subscriptioun of him that awe the samin and witnesse; or ellis, gif the partie cannot write, with the subscriptioun of ane notar thereto.”

6. What was the immediate cause of the disuse of sealing?

By the Act 1584, c. 4, it was declared that, with respect to sealing, the statute of 1579, c. 80, should not apply to such writs, contracts, or obligations, as the parties agreed should be registered in the Books of Council and Session, or other Judges’ books, registration being “ane greater solempne act nor the sealing thereof;” and after the passing of this statute sealing fell generally into desuetude.¹

7. Enumerate the statutes relating to the subscription of the party.

(1.) 1540, c. 117, recited in Answer 5.

(2.) 1579, c. 80, which statutes and ordains “that all contracts, obligationes, reversiones, assignationes, and discharges of reversiones, or eiks thereto, and generallie all writtes importing heritable titil, or otheris bondis and obligationes of great importance to be maid in time cumming, sall be subscribed and seilled be the principal parties, gif they can subscribe; utherwise be twa famous notars befor four famous witnesses, denominat be their special dwelling places, or some other evident tokens that the witnesses may be knawin, being present at the time, utherwise the saidis writs to mak na faith.”

(3.) 1672, c. 21, “Concerning the privileges of the office of Lyon-king-at-arms,” by which only noblemen and bishops are

¹ Dickson Evid. i. 349 (§ 640).

allowed to sign by their titles ; and it is declared that all other persons "shall subscribe their christened names or initial letter thereof, with their surnames ; and may, if they please, adject the designations of their lands, prefixing the word *of* to the said designations." The object of this statute not being to secure the authentication of deeds, its sanction is punishment of the offender and not nullity of the writ.¹

(4.) 1696, c. 15, requiring the subscription of each page of deeds written bookwise, and consisting of more than one sheet.(c)

8. What are the leading provisions of the Act 1681, c. 5, "concerning probative witnesses in writs and executions" ?

(1.) That only subscribing witnesses shall be probative, "and not the witnesses insert not subscribing."

(2.) That all writs wherein the writer and witnesses are not designed shall be null, and are not suppliable by condescending upon the writer or the designation of the writer and witnesses. [See as to present state of the law, Ans. 15.]

(3.) That no witness shall subscribe as witness unless he then know the party, and saw him subscribe ; or saw or heard him give warrant to a notary or notaries to subscribe for him, and in evidence thereof touch the notary's pen ; or that the party did, at the time of the witnesses subscribing, acknowledge his subscription ; otherwise the witnesses shall be punished as accessory to forgery.(d)

¹ Gordon, M. 16818.(b)

(b) In this case a deed subscribed "Fullerton of that ilk" was sustained.

(c) This exception from the rule of deeds consisting of only one sheet rests rather on decisions of the Court (Robertson, 7th Jan. 1742, Kilkerran, 606, M. 16955, Macdonald, 14th Feb. 1778, F.C.) than on the words of the Act, which see in Ans. 11.

(d) There is a case—Smith, 25th Jan. 1821, F.C.—the rubric of which bears "the genuineness of the granter's subscription to a deed being admitted, found not a relevant ground of reduction that the instrumentary witnesses did not see the subscription adhibited or hear it acknowledged ;" and which Professor More, in his Notes to Stair, p. 400, quotes as an authority to that effect ; adding, "Unless he shall allege forgery, there is a personal exception against his pleading that it was not duly executed." There was a proof led, however, on the point as to whether the allegation regarding the witnesses was or was not correct, and it appears from the report of the case in the House of Lords

(4.) That none but subscribing witnesses shall be probative in instruments of sasine, resignation, &c., and in messengers executions; and that no execution shall infer interruption of prescription in real rights, unless done before witnesses present and subscribing.

(5.) That in all these cases the witnesses be designed in the body of the writ, otherwise the same shall be null.(e)

9. What were the statutes requiring the insertion of the writer's name?

(1.) 1593, c. 179, required all deeds to make special mention "in the hinder end thereof, before the inserting of the witnesses therein, of the name, surname, and particular remaining place, diocesis, and uther denomination of the writer of the bodie of the foresaid original writtes and evidentes; utherwais the same to make na faith in judgment."

(2 S. App. 263, 4th June, 1824) that the judgment there affirming that of the Court below, finding the bond valid, went on the ground that the evidence did not prove the allegation that the solemnities had not been duly observed; but Lord Gifford, who delivered the judgment, stated that when the question should arise, it will be a matter for very grave consideration whether or not the Act 1681 imposed the sanction of nullity on a deed executed as alleged. The pure question does not since then appear to have been raised; but in a recent case, where it was admitted by the granter that he had signed the deed, but alleged that "the witnesses, or one of them, did not see him sign it or hear him acknowledge his signature," an issue was granted, "whether the alleged witnesses to the document, No. 8 of Process, or either of them, did not see the pursuer subscribe the same, and did not hear him acknowledge his subscription." There were other issues on different grounds of reduction, but the granting of the one above quoted appears to assume that the admission of subscription was not *per se* sufficient to validate the deed; Couston, 26th Feb. 1862, 24 D. 607. See also the Church of England Assurance Co., 12th Feb. 1857, 19 D. 414; and Morrison, 23 D. 1099 and 1262, and 24 D. 625, where an issue as to the witnesses was granted, and observation as to what must be proved under it.

(e) In consequence of the use of the word "witnesses" in the Act 1540, c. 117, and 1681, c. 5, at least two are required in all deeds signed by the granter, and requiring to be attested; but under "The Companies Act, 1862," the signature of any subscriber to the memorandum or articles of association of any company constituted under the Act is sufficiently attested by one witness; 25 & 26 Vict. c. 89, §§ 11 & 16; and under the Merchant Shipping Act of 1854 (17 & 18 Vict. c. 104) the same rule applies to deeds connected with the sale and mortgage of ships.

(2.) 1681, c. 5, enacted that "All writs to be subscribed hereafter, wherein the writer and witnesses are not designed, shall be null, and are not suppliable by condescending upon the writer, or the designation of the writer and witnesses. (*f*)

(3.) [The Titles to Land Consolidation (Scotland) Act, 1868] authorised deeds to be partly written and printed or engraved or lithographed, providing, *inter alia*, "that the name and designation of the writer of the written portions of the body of the deed or conveyance or document, shall be expressed at length." This provision differs from that of the previous Titles Act in making it unnecessary to name and design the writer of the testing clause, and in not making it requisite that the name of the writer of the body of the writ be expressed "in writing."]—Sec. 149. (*g*)

10. What are the Acts requiring the authentication by witnesses?

When the deed is subscribed by the party's own hand, witnesses are required expressly by 1540, c. 117, and 1681, c. 5; and indirectly by 1593, c. 179. The Acts 1579, c. 80, and 1681, c. 5, require their attendance at notarial execution.

11. In what form were deeds formerly executed, and in what form are they now generally written, and what is the authority for executing them bookwise; and what are its requirements? (*h*)

Deeds were formerly preserved in the form of rolls, as many sheets of paper as were necessary being pasted together at the ends,

(*f*) A disposition was sought to be reduced as null in respect that the writer was not named in the testing clause, which ran as follows:—"I have subscribed these presents, consisting of this and the two preceding pages of paper, stamped according to law, by William M'Lean, junior, clerk to William M'Lean, accountant in Glasgow, at Glasgow, upon the 26th day of April, 1859, before these witnesses, Ebenezer M'Lean, clerk to the said William M'Lean, and the said William M'Lean, junior." The Lord Ordinary sustained this reason of reduction, but the Court repelled it. The deed, however, was reduced on another ground, which will be noticed hereafter; Johnston, 16th June, 1865, 3 M'P. 954.

(*g*) It has been held that the inserter of the testing clause, where different from the writer of the deed, need not be named; Watsons, M. 16860; Bank of Scotland, M. 16909; Lindsay, 27th February, 1844, 6 D. 771.

(*h*) This question and answer are altered.

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PREFACE TO THE FIRST EDITION.

THIS Manual consists of the notes and *memoranda*, in an arranged and extended form, made by the author last session in preparing for the competitive examinations in the Conveyancing Class of the Edinburgh University; and, although it is by no means intended to supersede the necessary labour of reading up the decisions and text-books from which it is compiled, the hope is entertained that it will be found a useful auxiliary to the student in prosecuting his studies, and in preparing for the class examinations. In the use of the book, the student is recommended to have it before him from day to day during the Course, altering it in conformity with the latest decisions or statutes; and, at the same time, carefully correcting its errors and supplying its defects.

The benefits resulting from that excellent system of examination matured in the Conveyancing Class by the late Professor Menzies, and successfully carried on by his successor, Professor Bell, can scarcely be overrated; for, besides

been reduced because "not subscribed on the joining of the sheets after the Act of Parliament establishing the custom of sidescribing the joinings."¹ The inconvenience of sidescribing may be avoided by inserting in the body of the deed an authority to one or two of the granters to sign the joinings.²(*m*)

13. Is it essential that the writer's name and designation be inserted *in the body* of the deed? State the reason.

It has been held that it is not absolutely necessary to insert the writer's name and designation in the *body* of the deed, a testament having been sustained, the writer of which was mentioned in the body of the deed merely as a witness, but added to his subscription, "witness and writer hereof."³ The Act 1593 requires the insertion of the writer's name and designation "before the inserting of the witnesses;" but the Act 1681 merely declares to be null all deeds wherein the writer and witnesses are not designed, and the repetition of the nullity at the end of the statute, where "the body of the writ" is mentioned, the writer is not referred to. However, it is better not "to depart from the established rule of practice, according to which the writer's name and designation are invariably inserted."⁴ [But see *Ans.* 15.]

¹ Menzies Lect. 96 (100); M'Donald, M. 16808.(*l*)

² Sclater, 11th Jan. 1831, 9 S. 248.(*n*)

³ Dronnan, M. 16869. See also Macpherson, 7th Feb. 1855, 17 D. 357.(*o*)

⁴ Menzies Lect. 81 (83).

(*l*) In Sym, M. 16713, a deed, though subsequent to the passing of the Act, had been sustained in respect the last sheet contained all that was material.

(*m*) Where there are a great many parties to subscribe, as in contracts of copartnery of joint-stock companies, it is usual now to write the deed on one sheet of paper, which can be got of any length that may be required from the makers, and to paste it on linen, for protection against friction or tearing.

(*n*) The case of Sclater was appealed, and reversed on the merits. The report in H. of L. bears that the defender "appealed on various grounds;" but whether the question as to sidescribing was one of them does not appear; W. & S. 5, 625.

(*o*) In this case the addition to his subscription ("writer hereof") was made by the witness after the record had been closed, and the omission had been noticed by the judge. See Callander, 17th Dec. 1863, 2 M'P. 291, where a bond of provision, which bore to be written by Thomas Innes, "and to be witnessed by" the said Thomas Innes and A B, junior, his clerk, though sustained on other grounds, was held to be null, in respect the writer was not designed.

14. Is it essential that the *names* of the witnesses be inserted in the deed ?

It is perhaps not necessary that the witnesses' *names* be mentioned in the deed, as in none of the statutes are the witnesses' names required, but only their designations ; and the reason for this may have been, as stated in Mr. Dickson's work on Evidence, that as the witnesses' names appeared in their subscriptions, their identification would be complete if only their designations were mentioned in the testing clause.¹ [But see Ans. 15.]

[15. What are the provisions of the Conveyancing (Scotland) Act, 1874, as to solemnities of execution ?

Section 38 provides :—"It shall be no objection to the probative character of a deed, instrument, or writing whether relating to land or not, (1) that the writer or printer is not named or designed, (2) or that the number of pages is not specified, (3) or that the witnesses are not named or designed in the body of such deed, instrument, or writing, or in the testing clause thereof, provided that where the witnesses are not so named and designed their designations shall be appended to or follow their subscriptions, and such designations may be so appended or added at any time before the deed, instrument, or writing shall have been recorded in any register for preservation, or shall have been founded on in any court, and need not be written by the witnesses themselves." See Thomson, 6 R. 161.]

[16. What are the provisions of the Conveyancing Act, 1874, as to deeds having "any informality of execution" ?

Section 39 is as follows :—"No deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by

¹ Dickson Evid. i. 383 (§ 722).(p)

(p) The names might be essential for identification, as where the designations were different.

the witnesses by whom such deed, instrument, or writing bears to be attested shall lie on the party using or upholding the same, and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to, or in a special application to the Court of Session or to the Sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such granter or maker and witnesses." See following cases on this enactment:—Addison, 2 R. 457; Smyth, 3 R. 573; M'Laren, 3 R. 1151; Veasey, 2 R. 748; Gardner, 5 R., H. of L., 105; Thomson, 6 R. 161; Tener, 6 R. 1111.]

17. Is a deed valid if the party, or one of the witnesses, have subscribed by initials, such being his usual mode of subscription?

(1.) A deed which the granter has subscribed with his initials is valid, on evidence of the party's practice so to subscribe, and on proof of the authenticity of the initials.¹(r)

(2.) As the witnesses must subscribe the deed, a person who cannot write, or who can write only his initials, is an incompetent instrumentary witness, and a deed so subscribed is, consequently, null.²

18. A person departing from his ordinary custom of executing deeds by his initials, adhibited to his will the initial of his christian name, and the first syllable of his surname, having been unable, through weakness, to complete it; Was the will validly executed?

No; for although a deed signed by initials is valid if such is the granter's ordinary method of execution, yet where it appears

¹ Ersk. 8, 2, 8.(s)

² Meek, M. 16806; Stewart, M. 16906.(t)

(r) This point may be more exactly stated thus:—A deed which the granter has subscribed with his initials is, provided they are legible, valid, on evidence of the party's practice so to subscribe; and if the instrumentary witnesses are alive, on proof by them of the authenticity of the initials.

(s) Erskine condemns the practice as contrary to the statute, but admits the rule; Coutts, M. 16804. See also Weirs, 22nd June, 1813, F.C.

(t) In this case one witness had signed for another.

to have been the party's intention to sign his name in full, the deed will be set aside as an incompleted act if the subscription is not finished.¹

19. What is the effect of a deed authenticated by the granter's mark ?

A deed signed by the granter's mark is null ;(x) as a person who can only so authenticate deeds is one who "cannot subscribe;" and in that case the law recognises only one method of execution—viz, subscription by notaries.²(y)

20. What is the effect of a deed if the granter has written his signature from a copy made by another person ; or if it has been previously traced for him on the deed ?

In the former case the deed is valid, because it is the signature of a party who can write ;³ but in the latter case it is null, because, when the signature is traced, the party merely blackens the writing previously executed, and there is a want of a uniform and proper character of hand.⁴(a)

¹ Moncrieff, M. 15936.(u)

³ Wilson, 28th May, 1800 ; Hume,

² Ersk. 3, 2, 8 ; Graham, 30th Nov. 1848, 11 D. 173.(z)

912.

⁴ Crosbie, M. 16814 ; Pringle, M. 16810.

(u) In this case the subscription was completed with the party's hand led.

(x) See as to bills so signed, *infra*, under Bills.

(y) This answer altered from original.

(z) See also Crosbie, 2nd June, 1865, 3 M.P. 870.

(a) The important element in this question is that the granter shall previously have been capable and in the habit of signing his name, though, from illness or other cause, he is at the time doubtful whether he can do so. If so, he may avail himself of such assistance as is afforded by having before him a copy or writing of his name done by another, because his signature is still his own writing. The report in the case of Wilson, referred to, bears that "the letters were coarse and unshapely, but distinct and fully formed, and such as could not have been written by any one who had not been in the use of subscribing her name. Moreover, this subscription of hers bore no likeness to Laurie's" (the writer's) "hand, and was in nowise an imitation of or drawing after her name as written by him." See also Ballingall, quoted under Ques. 21.

21. What is the effect of a deed, in the execution of which the granter's hand has been led ?

The deed is null ; because (1) the safeguard which *comparatio literarum* affords, is lost ; and (2) there is no sufficient security that the party wrote with his full free will.¹ [See Noble, 3 Rettie, 74, where a distinction is taken between the "leading" the hand, and "supporting" it.]

[22. What are the provisions of the Conveyancing Act, 1874, as to notarial execution ?

Section 41 provides that "without prejudice to the present law and practice, any deed, instrument, or writing, whether relating to land or not, may, after having been read over to the granter, be validly executed on behalf of such granter who, from any cause whether permanent or temporary, is unable to write, by one notary-public or justice of the peace subscribing the same for him in his presence, and by his authority, without the ceremony of touching the pen, all before two witnesses, and the docquet thereto shall set forth that the granter of the deed authorised the execution thereof, and the same had been read over to him in the presence of the witnesses. Such docquet may be in the form set forth in Schedule I. hereto annexed, or in any words to the like effect." The statute merely recommends the Schedule. A docquet otherwise sufficient was held not invalid by being disconform thereto. Atchison, 3 R. 388.]

23. What were the requisites of notarial execution before the Conveyancing Act ?

(1.) The granter must be unable to write, (c) or blind ; but the objection that the granter could write, is not competent to him or his representatives. (d)

¹ Falconer, M. 16817 ; Ballingall, 22nd May, 1806 ; Hume, 916. (b)

(b) The party here had never been taught, and could not write.

(c) The inability may proceed either from never having acquired, or from having, through age, illness, or otherwise, lost the power to write.

(d) The point here referred to was raised in Clark, 1688, M. 16838, where the objection, that the party was able to write, was taken by creditors. The Lords were unwilling to determine the relevancy of the reason, but "before answer ordained the assignee to adduce what probation he could to prove that the cedent was so sick as he could not subscribe his name."

(2.) There must be two notaries and four witnesses in deeds of great importance, or importing heritable title; one notary and two witnesses being sufficient in the case of testaments and deeds for sums below £100 Scots.(e)

(3.) The notaries must ascertain the identity of the granter (A. S., 21st July, 1688).

(4.) The granter must give the notaries special warrant to subscribe for him, and in evidence thereof touch their pen.

(5.) The mandate must be given, and the pen touched, and the deed signed in presence and hearing of the witnesses.

(6.) The docquet must set forth that special warrant and authority was granted to the notaries; and it must also bear, it is said, that the warrant extended to marginal additions, if any;(f) and, though not essential, it should also set forth that the pen was touched,(g) that the deed was read over in presence of the witnesses, and the fact and cause of the granter's inability to write. [The docquet must be holograph. Henry, 9 M'P. 503.]

(7.) The notaries must act as co-notaries, and sign simultaneously each page or leaf(h) of the deed, and also the marginal additions, adding the letters N.P. to their signatures, and on the last page appending their mottoes. The witnesses sign the last page only.¹

24. What is the nature of the authority for parish ministers acting as notaries in testaments?

Before the Reformation the functions of notaries were discharged by the clergy. But by the Act 1584, c. 133, clergymen are excluded from acting as notaries, "the making of testaments onely excepted;" the reason for the exception being the extreme urgency of these cases, and that ministers are ordinarily with sick persons at their death.² It has been held that they can so act only

¹ Duff's Feud. Con. 13; Menzies · ² Stair, 3, 8, 34.
Lect. 107 (111); Dickson Evid. i.
363 (§ 673, *et seq.*).

(e) In mutual contracts, where both parties are unable to write, two notaries are required for each; Craig, M. 16829.

(f) Elliot, M. 16838.

(g) See Dallas, M. 5677 and 16839.

(h) The Act 1686, c. 17, which requires the subscription only of each leaf, applies exclusively to sasines.

within their own parish ;¹ but Professor G. J. Bell says that “ the clergyman of the parish is not required.”²(i)

[Schedule I. of the Conveyancing Scotland Act, 1874, provides a form of docquet applicable, *inter alia*, “ as regards wills or other testamentary writings executed by a parish minister as notary-public in his own parish.”]

25. What classes of deeds by parties who could not write formerly required to be executed by two notaries in presence of four witnesses?

Deeds importing heritable title, and all deeds of “ great importance,”³ i.e., when the amount or value exceeds £100 Scots. Erskine⁴ says that “ a deed which, without laying any new obligation upon the granter, is executed merely in corroboration or satisfaction of a former, is not deemed a writing of importance, though the first obligation should have exceeded that sum ;” but it is to be observed that the decision(k) to which that learned author refers, besides being scarcely in point, was pronounced before the passing of the Act, 1681, c. 5. Personal obligations under £100 Scots, and testaments, whatever may be the value of the succession, might be executed by one notary and two witnesses.⁵

26. What are the rules of law, as laid down in the Earl of Fife’s case,⁶ as to deeds executed by blind persons,

¹ Hepburn, M. 16827.

⁵ Menzies, 136 (139).

² Bell’s Prin. 2232.

⁶ Duff v. Earl of Fife, 17th July, 1823 ; H. of L., 1 Sh. Ap. 498.(l)

³ 1579, c. 80.

⁴ Ersk. 3, 2, 10 ; Jack, 13th Dec.

1671, M. 12975.(k)

(i) A trust-deed executed by notaries found invalid, one of them being one of the trust-disponees and executors under the deed, and having interests and benefits conferred on him thereby ; Ferrie, 23rd Jan. 1868, 1 M’P. 291. The deed was held ineffectual also as to moveables, partly from the apparent intention to have two notaries.

(k) In the case referred to a bond for 5000 merks was objected to, in respect that it was signed by two notaries before only three witnesses, to which it was answered that it was not a deed of great importance, being in implement of a provision in a contract of marriage ; and it was held that if the bond did not exceed the prior provision it could not be reduced on that ground, but that if it did exceed the provision it was null.

(l) Reversing judgment of Court of Session, 30th Nov. 1819, F.C.

and as to reading the deed to the party before subscription?

(1.) In deeds by blind persons, notarial execution is not required by the Statute 1579, and the signature of the party is the proper signature to give effect to the deed.(*m*)

(2.) A deed appearing to be signed by the granter and witnesses is probative in law; and to impeach such a deed the challenger is bound to prove that the witnesses, or one of them, did not see the granter subscribe or hear him acknowledge his signature.

(3.) Reading before or at subscription is not a solemnity required by law.

(4.) To impeach a deed on the ground that the granter did not know its contents, it is not enough to prove that the deed was not read over, but the challenger must prove *de facto* that the granter subscribed in ignorance of the contents, the knowledge of the party being presumed if the deed is duly executed.

(5.) The fact that the deed was not read over is relevant, although not conclusive evidence that the party did not know the contents, inasmuch as his knowledge of the contents may be proved from other evidence, from which such knowledge may be inferred.(*n*).

27. Who are incapable of acting as instrumentary witnesses?

(1) Females(*o*) (by custom) [but by section 139 of the Consolidation Act, 1868, it is provided that any female person of the age of fourteen or upwards, not subject to any legal incapacity, may act as an instrumentary witness. Held, Hannay, 1 R. 246, that this enactment was not limited to deeds relating to heritage]; (2) pupils; (3) blind persons; (4) insane persons; (5) persons having a material interest in the deed, but the nomination to a gratuitous

(*m*) Notarial execution, though not required, is competent in the case of blind persons; Ker, 23rd May, 1837, 15 S. 983—Reid, 19th Dec. 1837, 16 S. 273; affirmed, 19th Feb. 1840, 1 Rob. App. 66.

(*n*) More correctly, the allegation of want of knowledge must be supported by further evidence than the fact here stated. The question is for the jury on the whole evidence.

(*o*) As to females, see Setton, 24th Feb. 1816, 1 Murray, 9, where an issue was sent for trial, whether the subscription of an instrumentary witness, who was a female, was her true and genuine subscription. Professor More, in his Notes to Stair (399), says, "it seems difficult to hold that they are not as competent to attest deeds as instrumentary witnesses as they are to bear evidence regarding these deeds," &c.

office(*p*) is not a disqualification ; (6) persons who cannot write ; (7) persons who do not know the granter, (*q*)—at least the witnesses must have credible information as to the granter's identity before signing.¹

28. Is it essential that the witnesses to a party's subscription shall in all cases immediately subscribe ?

It is not essential when the party signs in presence of the witnesses, but it is essential when the subscription is *acknowledged*, as the Act 1681 forbids witnesses to subscribe unless "the party did, *at the time* of the witnesses' subscribing, acknowledge his subscription."(*r*) [Spoken words are not necessary to such an acknowledgment, Cumming, 6 R. 963.]

29. What is the effect of vitiations in deeds ?

Vitiations in the essentials, not authenticated in the testing clause, are presumed to have been made fraudulently after execution, and without the granter's authority ; or otherwise that they have been made by the granter for the purpose of cancellation ; and they annul the whole deed, unless when separable, as in the case of legacies in testaments. Vitiations not in essentials will be held *pro non scriptis* if the deed is intelligible without the words vitiated, and there is no room to infer fraud.² It has been decided

¹ Ersk. 4, 2, 27 ; Dickson Evid. i. 1844, 6 D. 464 ; aff. 21st July, 1847, 370 (§ 689 *et seq.*). 6 Bell's Ap. 153. See also an in-

² Ersk. 3, 2, 20 ; Ross Lect. i. instructive article on this subject in 144 ; Shepherd *v.* Grant, 24th Jan. the Journal of Jurisprudence, ii. 291.

(*p*) Such as that of trustee or executor. In practice it is better to avoid having deeds attested by any one who is either a party to or interested under them.

(*q*) Act 1681, c. 5.

(*r*) A question was lately raised as to the meaning of this part of the Act. It was objected to the testing of a deed that the two instrumentary witnesses who had heard the granter acknowledge his subscription had not been in presence of each other when they did so ; but the objection was repelled ; Hogg and Others, 12th March, 1864, 2 M'P. 848. The point seems to have been previously decided in the same way ; Robertson, 1st Dec., 1823, 2 S. 544.

In Miller, 20th Feb. 1829, 7 S. 444, an objection to a deed that the testing clause bore that it had been "written," but not that it had been "subscribed," before the witnesses, was repelled.

in the House of Lords that, although deleted words in holograph wills cannot be restored, they may be read to see what the granter at one time intended.¹

30. If the granter admits that vitiations, not authenticated in the testing clause, were made before subscription, will that be sufficient to sustain the deed?

Such an admission is not sufficient, because the authenticity of a deed cannot be proved by extrinsic evidence.² "To admit such evidence would be contrary to the nature of a probative instrument—the very admission of the necessity of such proof being also an admission of the invalidity of the instrument."—*Per Lord Wood.*³

31. A deed bore to be in favour of "John," one of the granter's sons, but the name was written on erasure throughout the deed. The testing clause stated that these presents "are subscribed by me in favour of the said John, my son," but it did not refer to the erasures; Was the deed valid? State the reason.

No; because there must be a specification of the erasures in number and position; while in this case there is nothing to exclude the supposition that the deed had been executed in favour of another, and that, either from a change of purpose in the granter, or in order to correct an error, it had been altered in the interval between its execution and the completion of the testing clause.⁴

32. What is the effect of a marginal addition in one duplicate of a contract but not in the other?

A marginal addition on one of the duplicates is probative against the party who is possessed of and founds on that duplicate;

¹ *Mags. of Dundee v. Morris*, 1st May, 1858; H. of L., 3 Macq. 134. *land Assurance Co.*, 12th Feb. 1857, 19 D. 414.

² *M'Farlane*, M. 8459; Bell's *3 Shepherd, supra*, 6 D. 464.

Conv. 145, note.(s) *Church of Eng-* ⁴ *Reid v. Kedder*, 24th June, 1834; (t) 1 Rob. Ap. 183.

(s) Bell on Testing of Deeds, Lect. iv. p. 108.

(t) 12 S. 781, 6th March, 1835; 13 S. 619, H. of L., 30th July, 1840.

but if it is in his favour it is not binding on the other party unless proved by his oath.¹

33. What is the effect of a marginal addition being cut away from a duly tested deed, and also of such addition being left unsigned?

In the first case the deed is invalidated;² and in the latter the addition is held *pro non scripto*.³

34. What is the effect of a deed wanting the place and date of subscription? State the reason.

(1.) A deed wanting the place of execution is valid; because the granter's power of contracting is independent of locality.

(2.) A deed wanting the date is likewise valid, unless its effect depends on its date.⁴

35. Where both witnesses depone that they neither saw the granter subscribe, nor heard him acknowledge his subscription, is that testimony of itself necessarily sufficient to reduce the deed?

The testimony of the two instrumentary witnesses is not of itself necessarily sufficient to reduce the deed, their evidence being received with suspicion when contradicting their written attestation. There must be collateral proof in support of their testimony, or circumstances of real evidence to corroborate them. Their admissibility is undoubted, but their credibility is a question for the jury.⁵

36. May errors in the testing clause of a deed be corrected after it has been given in to be recorded?

A deed may be borrowed up within six months after it has been given in for registration in the Books of Session, provided

¹ Ersk. 3, 2, 20.(u)

² Cunninghamhead, M. 12274.

³ Carnegie, 4 Br. Sup. 242.

⁴ Menzies Lect. 120 (124).

⁵ Cleland, 15th Dec. 1838, 1 D. 254.

(u) The rule, as here laid down by Erskine, is that "it is not binding on the adverse party unless it be supported either by his oath or by posterior relative writings, or in special cases by the testimony of the instrumentary witnesses."

SUBSTITUTION OF DEEDS

... of Loris that, although deleted words in handwriting
... they may be read to see what the grantor
... intended.

... grantor admits that vitiations, not authenticated
... testing clause, were made before subscription.
... be sufficient to sustain the deed!

... is not sufficient, because the authenticity
... proved by extrinsic evidence? To admit
... be contrary to the nature of a probative
... admission of the necessity of such proof
... of the invalidity of the instrument."

... to be in favour of "John," one of the
... but the name was written on erasure
... the deed. The testing clause stated that
... "are subscribed by me in favour of the
... son," but it did not refer to the erasures;
... valid? State the reason.

... must be a specification of the erasures in
... while in this case there is nothing to
... that the deed had been executed in favour
... either from a change of purpose in the
... correct an error, it had been altered in the
... execution and the completion of the testing

... of a marginal addition in one dupli-
... tract but not in the other?

... one of the duplicates is probative
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... Land Assurance Co., 12th Feb. 1857,
... 19 D. 414.

... Shepherd, *supra*, 6 D. 464.

... Reid v. Kedder, 24th June,
... 1834; (t) 1 Rob. Ap. 183.

... iv. p. 108.

... S. 619, H. of L., 30th July, 1840.

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pp. 210.
I. of L., 2nd June, 1865,

in a public register.¹(a) [See Hill, 9 M.P. 223 ; Veasey, 2 R. 748 ; Millar, 4 R. 87.]

[39. What are the provisions of the Conveyancing Act, 1874, as to the execution of deeds by companies registered under the Companies' Act, 1862 and 1867 ?

“ Any deed executed after the commencement of this Act to which any company registered under the Companies' Acts, 1862 and 1867, is a party, shall be held to be validly executed in Scotland on behalf of such company, if the same is either executed in terms of the provisions of these Acts, or is sealed with the common seal of the company and subscribed on behalf of the company by two of the ordinary directors and the secretary of the company, and such subscription on behalf of the company shall be equally binding and effectual whether attested by witnesses or not.” Section 56.]

II. PRIVILEGED WRITINGS.

40. Enumerate the writs which are privileged as regards authentication, and state the reasons for which they are so privileged.

(1.) Holograph writs—on account of the greater difficulty to counterfeit a person's handwriting throughout a deed than to forge the signature ; and because writing and subscribing a document is more trustworthy evidence of deliberate intention and freedom from constraint than merely subscribing a deed written by another.²(b)

(2.) Deeds not of “ great importance ”—*i.e.*, for sums under £100 Scots—because such deeds do not come within the terms of the Act 1579, c. 80 (see Ans. 7) ;³ and because obligations within £100 Scots are proveable by parole evidence.

¹ Bell's Prin. 2226.

³ Ersk. 3, 2, 13, and 3, 2, 10.

² Dickson Evid. i. 397 (§ 751).

(a) In Shaw, 6th March, 1851, 13 D. 877, it was held that the grantee of an onerous deed which had been executed without a testing clause was entitled *ex post facto* to insert one, there being sufficient space above the granter's signature.

(b) Stair, 4, 42, 6 ; Ersk. 3, 2, 22.

(3.) Testaments may be executed notarially by one notary in presence of two witnesses—the privilege being rested on the ground of preventing the injurious consequences that might ensue from the presence of many persons in the last hours of life.¹ Testaments are further privileged in respect that the parish minister may act as notary. [See Ans. 22 and 24.]

[By the Act 24 & 25 Vict. c. 114, it is provided :—1. That every will made by a British subject (whatever his domicile at the time of making or at his death) shall, as regards personalty, be held well executed for the purpose of being admitted to probate. (a.) *When made out of the United Kingdom*, if in the forms required by the laws of the place where made, or where such person was domiciled at the time, or by the laws in that part of H.M.'s dominions where he had his domicile of origin (§ 1). (b.) *When made within the United Kingdom*, if executed in the form required by the law in that part of the United Kingdom where made (§ 2). 2. That no will shall be held revoked by any change of domicile of the maker (§ 3). 3. The Act does not invalidate any will as regards personalty that would have been valid had the Act not been passed (§ 4).

(4.) Writings *in re mercatoria*—on account of the dispatch and the spirit of confidence which are necessary in mercantile transactions ; and because such writings regulate the transactions of subjects of different countries, and it would be impracticable to require foreigners to comply with the formalities of the municipal laws of other states.² Bills and notes falls under this rule, although not granted *in re mercatoria*.

(5.) Receipts and discharges to tenants for rent—“on account of their rusticity, as lawyers express it, or their little skill in business.”³

(6.) Prorogations and devolutions in submissions—because they are *quasi* judicial acts.⁴

(7.) Informal writings referred to in probative deeds—because they are held to be incorporated therein, if properly referred to.⁵

(8.) Foreign deeds regarding moveables—on the principle of *comitas legum* ; and because those who enter into contracts regard-

¹ Bell's Com. i. 342.

² Menzies, 137 (141).

³ Ersk. 3, 2, 23.

⁴ Dickson Evid. i. 408 (§ 782).

⁵ Dickson Evid. i. 418 (§ 808 et seq.)

ing moveables, which have no locus of their own but follow the person, are presumed to have in view the law of the country where the contract is undertaken.¹(c)

[(9.) It is usual in transfers of stock of Railways and Limited Liability Companies that only one witness shall authenticate each signature.]

41. Would an unattested bond written and subscribed by a debtor, but not bearing to be holograph, warrant summary diligence if it contained a clause of registration for execution? State the reason.

Such a bond would not warrant summary diligence; because its validity, resting on its being holograph, is a latent fact, which must be proved by extrinsic evidence,² and to warrant summary execution the deed must of itself be complete.

42. What is the legal presumption with respect to unsigned holograph writs?

The presumption with respect to unsigned holograph writs is, that they are incomplete acts, from which the party has resiled; and, when they are not connected with other documents, subscription is necessary to show that the granter has put them out of his hands as finished acts, by which he intended to be bound;³ but the presumption is otherwise where there is reason to presume that the writ is complete without subscription, as a postscript to a signed letter.⁴(d)

¹ Menzies, 139 *et seq.* (143).

³ Stair, 4, 42, 6; Ersk. 3, 2, 22.

² Dickson Evid. i. 308 (§ 754).

⁴ Wauchope, M. 16965.

(c) By 19 & 20 Vict. c. 56, § 38, it is provided that "All bonds or obligations granted, or that may be granted, to Her Majesty in the form heretofore in use in the Court of Exchequer in Scotland, shall be deemed and taken to be probative documents, and shall have all the like privileges, operation, and effect as if duly executed and attested according to the law of Scotland." See also note (c) to Ans. 8.

(d) In Robertson, 20th Dec. 1844, 7 D. 236, Lord Mackenzie expressed his opinion that "If the maker declared in the deed that it should be valid without subscription, in virtue of the superscription, that deed would be quite valid."

It has been held that a holograph but unsigned docquet by a notary signing for a party who cannot write is effectual if it contains the notary's name in *gremio*; Cullen, M. 16842.

43. Do unattested holograph writs prove their dates? State the reason.

Unattested holograph writs do not prove their dates ; because were it otherwise, the rights of competing creditors or of heirs in questions of deathbed, and the like, could easily be defeated by false dating.¹ There is an exception to this rule in the case of a debtor's written acknowledgment of intimation of an assignation, which is probative of its date, although not tested.^{2(e)}

[The law has been altered as to testamentary holograph writs by section 40 of the Conveyancing Act, 1874, which provides that "every holograph writing of a testamentary character shall, in the absence of evidence to the contrary, be deemed to have been executed or made of the date it bears."]

44. Is there any distinction betwixt attested deeds and holograph writs, with respect to erasures?

Words written on erasure in attested deeds, duly authenticated in the testing clause, are held to have been made before execution ; but words written on erasures in holograph writs must not only be proved to be genuine, but the dates of such alterations must also be proved ; hence merely proving when the body of the deed was written, will not give the erasures effect as of the same date.³

¹ Ersk. 3, 2, 22.

² Bell's Prin. 1465.(f)

³ Robertson, 20th Dec. 1844, 7 D. 236 ; Durie, M. 16927 ; Johnston, M. 17063.(g)

(e) See as to intimation of assignations, 25 & 26 Vict. c. 85, § 2, *infra*, Ques. 300.

(f) Newton & Co., M. 850 ; Bell's Com. 2, 17 ; Dickson Evid. § 766.

(g) The cases referred to hardly warrant the distinction here drawn. In the case of attested deeds the answer assumes that words written on erasure are duly authenticated in the testing clause, while in the case of Robertson, where the deed was holograph, the erasures were not so authenticated ; but had they been so, there seems no reason to doubt that they would have received the same effect as in attested deeds. In Robertson, Lord Mackenzie expressed a somewhat different opinion from that in the answer as to the effect of erasures in holograph deeds. See as to holograph superinductions on erasures in deed not holograph, Grant, 27th Feb. 1849, 11 D. 860. Mags. of Dundee, 20 D. 9.

45. What peculiar risk of challenge is to be kept in view in regard to holograph obligations by unmarried women ; and how is the risk to be avoided ?

In the event of the granter's marriage, the deed, in a question with her husband, will be presumed to have been granted after marriage, and consequently will not subject him to liability.¹ The risk may be avoided by recording the deed in a public register.

46. What is the presumption with respect to the date of an unattested holograph settlement of heritage in a question with the granter's heir ?

A holograph settlement not tested is presumed to have been granted on deathbed ; but the presumption may be redargued by proof to the contrary ;² [but see Ans. 43, the presumption is now altered].

47. When a deed is founded on as holograph, on whom is the *onus probandi*, and what is required to be proved ?

The *onus probandi* rests on the party founding on the deed ; and he must prove that it is wholly genuine, and not simply that the signature is the penmanship of the same hand as the body of the writ.³ But if the deed bear to be written by the granter, the *onus* is on the party challenging.⁴(*l*) [See Ans. 43.]

¹ Dows, M. 12490.(*h*)

⁴ Turnbull, 29th Feb. 1844, 6 D.

² Stair, 3, 4, 29 ; Ersk. 3, 8, 96.(*i*) 896.

³ Anderson, 16th April, 1858 ; H. of L., 20 D. 7.(*k*)

(*h*) The reference should be to Temple, M. 12490 and 12606. The case of Dows, which is reported M. 12607, refers to a question with the granter's heir.

(*i*) Mr. Dickson thinks there is no presumption of the deed having been granted on deathbed, and states the rule on this point as follows :—"A holograph deed untested is not probative of its date, which must therefore be corroborated by other evidence, according to the nature of the case, and the party founding on the deed must bear the burden of proof, because he is *in petitorio*, and maintains the affirmative ;" Dickson Evid. § 762. See Waddel, May, 1845, 7 D. 605.

(*k*) Affirming judgment of Court of Session, 20 D. 1326.

(*l*) It may be doubted whether there is sufficient authority for this qualification of the general rule. In Robertson, 20th Dec. 1844, 7 D. 286, Lord

48. What are the privileges of writings *in re mercatoria*?

(1.) They are authentic without witnesses, although not holograph.

(2.) They prove their dates without witnesses in ordinary mercantile transactions; but the date must be adminiculated when the writ is challenged by the grantor's heir on the head of deathbed,^(m) [reduction *ex capite lecti* was abolished as regards persons dying after 16th August, 1871, by 34 & 35 Vict. c. 81], or by his creditors, as having been granted to create a fraudulent preference.

(3.) Subscription by initials or mark is effectual if admitted or proved to be genuine.¹

49. A testator directed his executor to pay certain bequests contained in an improbative "letter signed by me of this date, to the several persons therein named⁽ⁿ⁾ and such other bequests as I may leave by any writing

¹ Menzies Lect. 138 (142); Dickson Evid. i. 410 (§§ 667-784 *et seq.*)

Fullerton said,—“I think we are bound to consider the body of the deed as holograph by the force of the testing clause, until that be disproved;” and in Turnbull (here cited) Lord Jeffrey said,—“An averment in the body of the deed, that it is written by the maker's own hand, is sufficient” to shift the *onus*; but in neither of those cases was the point decided; while in Anderson (here cited), Lord President Boyle, while alluding to that opinion of Lord Jeffrey, as reported, stated it “to be clear in point of law that it was incumbent on” the party founding on a holograph deed, the genuineness of which was contested, to prove its authenticity; and in the same case in the H. of L., Lord-Chancellor Chelmsford said,—“The essential part, without which all the rest of the case was irrelevant, was to show that the document was in the handwriting of the deceased. Upon principles of common sense, if a man produced a will, which was disputed, he must prove it.” In that case the document did not bear to be holograph, but that does not seem to have been the ground of the opinions.

See as to an attested holograph mutual deed, Laurie, 14th Jan. 1859, 21 D. 240.

(m) The law of deathbed is hardly applicable to writings properly *in re mercatoria*.

(n) According to the report of the case referred to, which in the Court of Session is reported under the name of Buchan, 27th May, 1828, 6 S. 864, the circumstances were not as stated in this question. The words, “and such other bequests as I may leave by any writing under my hand,” do not occur in the deed, and there was only one letter left, being that of the same date with the deed, so that the decision does not afford authority for the distinction drawn in the answer. Since then, however, there has been a series of decisions which have established a different principle. Thus, two sisters

under my hand ;” and he left another improbative letter containing additional legacies : Were the legacies in both or either of the letters effectual ? State the rule.

The legacies in the former letter are effectual, but those in the latter are null ; the rule being, that informal writings properly referred to in probative deeds, and *then in existence*, are held to be imported into the probative deed by reference ;¹ but when the

¹ Inglis, 13th Oct. 1831, 5 W. & S. 785, H. of L.(o)

executed a mutual settlement, duly authenticated, whereby they directed their trustees, after payment of all charges and expenses, “and of all legacies or payments which we may direct to be made out of our respective shares by any letter or other writing under our respective hands, whether formal or informal,” to dispose of the residue “in such way and manner as the survivor of us may direct by any such letter or writing.” A letter holograph of one of the sisters, and signed by both, but not tested, was sustained as effectual to constitute a bequest ; Wilson’s Tra., 13th Dec. 1861, 24 D. 163. A testatrix by a formal trust-deed directed her trustees to pay all “legacies or bequests which by a writing or writings under my hand, hereunto annexed, or on a paper or papers apart, I shall make or settle.” She left a separate document, neither holograph nor tested, headed “Codicil to my Will,” and commencing, “August, 1860. I wish to bequeath the following legacies,” and then followed three pages of legacies to different persons, after which came these words, which were holograph : “This is written at my dictation,” followed by her signature and date. The first and second pages were unsigned, but there were holograph interpolations and alterations on the first page. The document was sustained as effectual ; Young’s Tra., 3rd Nov. 1864, 3 M’P. 10. See also Rankine, 7th Feb. 1849, 11 D. 543 ; and Preston’s Tra., 15th July, 1856, 18 D. 1246. The principle now established seems to be that, if a party convey his property to trustees by a probative trust-deed, he may in that deed declare what form of writing shall be sufficient as an expression of his instructions ; in short, that he may make the law in this respect for himself ; and all that is required is that such writings, if of earlier date, should be identified as those referred to in the deed, and if of later date, as those intended in it ; Dickson Evid. p. 495. See also Crosbie, 2nd June, 1865, 3 M’P. 870. In this case it was also held that the deed, having been executed in duplicate, and one copy found in the testatrix’s repositories mutilated, but there being no evidence that the mutilation was by her, the duplicate copy in the hands of her agent was valid.

In a recent case, three out of four holograph writings, admitted to be genuine and probative by a party who had previously executed a trust-deed and settlement containing a reserved power to alter, were held not effectual as testamentary writings ; but the judgment proceeded on grounds not affecting the principle here stated ; Lowson, 20th March, 1866, 4 M’P. 631.

(o) Reversing judgment, 27th May, 1828, 6 S. 864.

writing referred to is to be prepared at some future date, it must be holograph, or attested in terms of the statutes.¹(p)

50. Would a foreign conveyance regarding moveables deficient in the solemnities required by the *lex loci contractus*, in respect, for instance, that it is unsealed, be sustained in this country, where such solemnities are not required?

Such a deed would not be sustained; for in order that a foreign deed may receive effect in this country, it is an implied condition that it be valid according to the law of the country where it was made.² But deeds which are intended to take effect in this country, and are executed according to Scotch law, will be effectual here though informal by the *lex loci contractus*.³(r) [See as to wills, addition to Ans. 40.]

51. Is a foreign will, which is formal by the *lex domicilii testatoris*, effectual as a bequest of heritable subjects in Scotland?

No; because Scottish heritage can be transmitted only in the form of a *de presenti* conveyance.⁴ [But see following Answer.] But where heritage in Scotland is conveyed by a formal disposition executed according to the law of Scotland, and referring to a foreign will made, or to be made, such a disposition and will may be read together as an effectual settlement.⁵(s)

¹ See Ross Lead. Cases, Land Rights, i. 417 *et seq.*

² Story's Confl., § 266 a.

³ Taylor, 16th July, 1847, 9 D. 1504; *per* Lord Fullerton.

⁴ Ersk. 3, 2, 41.

⁵ Cameron, 19th May, 1831, 9 S. 601; *aff.* 7 W. & S. 106.

(p) See note (n) *supra* to Ques. 46.

(r) The case of Taylor here cited was a transfer of claims under an obligation, not contracted, but alleged to be due in Scotland. The transfer, which by the law of England, where it had been executed, was invalid, was founded on as a title to sue, for which purpose it was held ineffectual, because the right to sue could arise only through a right to the claims, which had not been thereby acquired. The opinion expressed by Lord Fullerton was very general, and made no special reference to Scotland.

(s) The legal effect of such a combined trust-deed is a question to be decided by the law of Scotland. See Richmond's Tra., 25th Nov. 1864, 3 M.P. 95, where it was held that a Scotch trust conveyance of heritage and subsequent Irish testament were to be read together.

[52. What alterations on the law in regard to *mortis causa* settlements of land were made by the Consolidation Act, 1868?

They are shortly—(1.) That land may be settled not only by *de presenti* conveyances but by testamentary or *mortis causa* deeds or writings executed in the manner required or permitted by the law of Scotland in the case of testamentary writings.

(2.) That no such deed or writing granted by any person alive at the commencement of the Act, or granted by any person after the commencement of the Act, shall be considered invalid on the ground that the granter has not used the word “dispone” or other words importing a conveyance *de presenti*. [It will be kept in view that by section 27 of the Conveyancing Act, 1874, “dispone” is no longer a *vox signata* in *inter vivos* deeds relating to land.]

(3.) That where such deed or writing shall contain, with reference to such lands, words sufficient to transfer moveables, such deed or writing if duly executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland, shall be held to be a general disposition of such lands within the meaning of the Act, and shall confer on the granter right to make up a title thereto.]

53. When a foreign deed, duly executed according to the law of the country where it is made, but informal by Scotch law, contains a conveyance of land in Scotland, or an obligation to convey such land, is it valid to any effect?

An obligation to convey land, if formal by the *lex loci contractus*, may be enforced by action in this country against the granter and his heirs, because it is a personal obligation *ad factum præstandum*.¹ But a foreign conveyance of heritage has been held not only null as a conveyance, but insufficient even to found an action against the granter to oblige him to grant a formal disposition.² Lord Kames, however, distinguishing betwixt an onerous disposition and a gratuitous conveyance *mortis causa*, maintains that, on equitable grounds, the former ought to be sustained as a ground of action, if formal by the *lex loci contractus*,

¹ Ersk. 3, 2, 40.

² Dalkeith, M. 4464.

because it is the counterpart of the grantee's implemented obligation to pay the price.¹(*t*) [See Ans. 52, and addition to Ans. 40.]

54. May a disposition of Scotch heritage be revoked by an English will?

Yes; the principle being, that any declaration of will is sufficient to revoke, and a foreign deed properly executed affords sufficient evidence of such will or intention.²(*u*) [See Thomas, 7 M.P. 114.]

55. Would a deed, executed in England according to the formalities required there, be received as probative in this country; or must its genuineness be proved by the attesting witnesses according to the English rule? State the reason.

Such a deed will not be received as probative in Scotland;

¹ Kames' Equity, 551; 1 Ross
Lead. Ca. 118.

² Leith's Trs., 6th June, 1848, 10
D. 1137, and 1 Ross L. C. 691.

(*t*) See the opinions of the consulted judges in Purvis, 23rd March, 1861, 23 D. 812, where Lord President M'Neill, Lords Ivory, Curriehill, Deas, Neaves, Ardmillan, Mackenzie, and Jerviswoode stated as (p. 826) "the clear rule of law that no writing can avail as a conveyance or disposition of Scotch heritage that is not framed, both in point of style and in point of formality, according to the peculiar law and practice of Scotland." The Lord Justice-Clerk (Inglis) also stated the law to be that (p. 831) "All instruments (without distinction, *except in the case of conveyance of land*) executed abroad according to the solemnities of the place of execution must receive effect in Scotland exactly in the same way as if they were executed within Scotland according to the solemnities of the Act 1681." See also Campbell, 24 D. 1321.

(*u*) In the case of Leith's Trs., referred to, a majority of the whole Court held that a disposition of Scotch heritage may be so revoked; and in Purvis, *supra*, a similar opinion was given by the whole Court (*diss.* Lord Kinloch); but the point has not been actually decided, a majority of the judges having held, in Leith's Trs., that a revocation of "all former wills, codicils, and testamentary dispositions" was not intended to revoke, and did not revoke, the Scotch disposition of heritage; and in Purvis matters were not in a condition for applying the principle, which however may probably be held as settled. An important distinction was also referred to in the opinion of the Lord President and other judges in Purvis—viz., that if "the writings could only be held to infer an implied revocation, by importing a new and different disposition of the subjects, we think they would be ineffectual for that purpose so far as heritage is concerned," if "they are not so executed as to form a valid disposition of heritage."

because the English solemnities of execution are not intended to afford full proof of authenticity, and therefore to admit the deed without corroborative evidence would be to give it greater effect in Scotland than it would receive in the English Courts.¹ [The alterations in the requisites of probative writs by section 38 of the Conveyancing Act, 1874, will be kept in view.]

III. DELIVERY OF DEEDS.

56. On what principle is a deed ineffectual without delivery?

The principle on which delivery is required to give efficacy to a deed is, that it being in the power of the granter until delivered, it is presumed that he has not finally resolved to be bound by it.² The rule is also designed for protecting creditors against fraudulent latent deeds granted by their debtors.³

57. What classes of deeds do not require delivery, and for what reasons?

(1.) Deeds which contain a clause dispensing with delivery; because they sufficiently mark the final intention of the granter.⁴

¹ Dickson Evid. i. 533 (§ 1038 et seq.) (x)

² Dishingtoune, 1 B. Sup. 259; Simpson, M. 11570.

³ Ersk. 3, 2, 43; Dickson Evid. i. 483 (§ 934).

⁴ Ersk. 3, 2, 44.

(x) Mr. Skelton, in his Notes to the passage of Mr. Dickson's work here referred to, says,—“The passage in the text seems opposed to the settled rule that a written contract, executed according to the forms required by the *lex loci contractus*, will be received as well as executed in the courts of other countries.” In an old case, where an action was brought on an English double bond, and the defender denied the subscription, and pleaded that the bond was not probative unless proved by the witnesses, the Court found this impracticable at this distance, and repelled the plea; Chatto, M. 4456 and 4447. The rule may perhaps be stated thus:—Where there is a question as to the due authentication or formality of a foreign deed, the Court will take the opinion of lawyers of the country where the deed was made. See Hopetoun's Trs., 6th March, 1856, 18 D. 739, where queries were submitted to English counsel regarding the validity of a decree-arbitral issued in England; and Purvis, *supra*, where it was found “that by the law of Scotland, in which country the testator died domiciled, the succession to his moveable property will depend upon the formality, according to the law of the country in which they were executed, of the testamentary writings executed by the testator in the Netherlands, India, as constituting a last will and testament of moveable property,” and proper steps appointed

(2.) A deed making alterations upon a prior deed containing such a clause ; because it is accessory to the first.¹

(3.) Testamentary deeds ; because they are meant to be final expressions of the granter's will.²

(4.) Deeds reserving a power to alter ; because they are of the nature of testamentary deeds.³

(5.) Bonds of provision to wife and children ; because the husband and father is the proper custodier of their writings.⁴(y)

(6.) Deeds in which the granter has a reserved right ; because he is presumed to hold for his reserved interest.⁵

(7.) Deeds executed in implement of an antecedent obligation ; because, as the creditor could have insisted on such a deed being granted, he is entitled to recover it when it has been executed.⁶

(8.) Bilateral contracts ; because such deeds are common rights to all the contractors ; and if one of the parties can use such a deed as a deed effectual to himself, it must also be effectual to the rest.⁷ [Also mutual deeds executed in duplicate ; Robertson, 1 R. 323.]

58. What acts constitute equivalents to delivery ?

(1.) The acting upon the deed by the granter ; as by raising diligence in the grantee's name.⁸

(2.) The placing of a deed upon a public record.⁹ [Bell's Principles, 33 ; and Tennent, 7 M'P. 936.]

¹ Eleia, M. 16999.

² Ersk. 3, 2, 44.

³ Young, 4 B. S. 259.

⁴ Ersk. 3, 2, 24.

⁵ Ersk. 3, 2, 44.

⁶ Ersk. *ib.*

⁷ Ersk. *ib.*

⁸ Dick, M. 6548.

⁹ Downie, 5th Dec. 1843, 6 D. 180.(z)

to be taken for ascertaining the effect and validity of these writings by the foreign law." See also Thomson's Trs. 18th Dec. 1851, 14 D. 217 ; and Disbrow, 27th Nov. 1852, 15 D. 123.

(y) Deeds in favour of natural children, and by mothers, fall under same rule ; Ersk. 3, 2, 44 ; Aikenhead, M. 16994.

(z) This was the case of a bond of provision by a father to trustees for his children, which bore to be irrevocable. It had been delivered by the granter to his agent, who had intimated it to the trustees as well as put it on record, and the granter himself had in a subsequent letter indicated that he considered the deed as delivered. In Leckie, M. 11581, registration was found equivalent to delivery with regard to heritage, but not as to moveables, though the deed contained a clause dispensing with the delivery.

(3.) The registration of a sasine upon an undelivered deed.¹(a)

59. What is the legal presumption as to delivery of a deed found in the granter's possession.

A deed found in the granter's possession is presumed either not to have been delivered, or to have been returned after delivery for some reason inconsistent with its remaining effectual.²

60. A party wrote to his creditor, inclosing bank notes in payment of his debt, and the letter was intrusted to a servant, to be given next morning to the post-runner. The party died in the morning, before the postman came, and the letter was retained? Was it delivered?

In these circumstances it was held that the letter was delivered; on the principle that delivery is complete when the granter has himself done whatever he can to complete it.³(b)

61. A proprietor of an estate died, leaving a son and a minor daughter, and the son granted to his sister a bond in name of tocher; Did it require to be delivered?

In the case cited *infra*,⁴ it was held that such a bond did not require to be delivered; because it was of the nature of a provision which the father would have granted if he had been alive; and because the deed was in fulfilment of the granter's obligation to aliment his sister, to whom he stood *in loco parentis*.

¹ Bruce, M. 11185.

² Crawford, 1807, M. App. "Moveables," No. 2.

³ Tait Evid. 155; Dickson Evid. i. 490 (§ 951).

⁴ Morrison, 4 B. Sup. 40.

(a) See observations as to effect of recording deeds and sasines; Burnet, 26th March, 1864, 2 D. 929.

(b) This case was very peculiar—(1) the letter was taken possession of by a person who was accidentally in the house, and had no right to interfere; (2) the competition was with a trustee who was appointed by the creditors, but had no judicial authority, and made up no title of any kind, but got the money from the person who had taken possession of it; (3) the letter contained only the halves of the notes, which makes the case stronger; but the Court proceeded on the assumption that the bank would have paid on delivery of the halves and the letter, which stated that the others would be sent—a view which may be doubted. There was certainly no completed delivery during the party's lifetime, and had the person who took possession been entitled as executor or otherwise to do so, or had the trustee been judicially appointed, the result might have been different.

62. A grants an assignation to B, partly for his own and partly for B's behoof, receiving from B a back-bond; and A afterwards, intending to transfer his interest to C, executes in favour of B a discharge of the back-bond, and B delivered a new back-bond to C; but the discharge, from inadvertence, remained in C's hands undelivered. In a competition between C and an arrester of A's interest, Who will be preferred? State the reason.

The arrester of A's interest will be preferred; because the discharge was not delivered to B, or to some one on his behalf.¹(c)

63. What is the legal presumption as to delivery of deeds found in the hands of a third party?

(1.) Deeds in the hands of the grantee's agent are presumed to be delivered; while deeds in the hands of the granter's agent are presumed not to be delivered.²

(2.) A neutral depository, or the agent for both parties, is presumed to hold for unconditional delivery to the grantee, if the deed is onerous;³ but if the deed is gratuitous, the presumption is that the deposition was made for the purpose of delivery in the case only of non-revocation.⁴

64. The agent for both parties to an intended heritable security for £900 got possession of the bond; but although he had received the whole sum from the lender, he had paid only £669 of it to the borrower,

¹ Boyd, M. 16993.

² Bell's Prin. 23.

³ Ersk. 3, 2, 44.

⁴ Dickson Evid. i. 496 *et seq.* (§ 963 *et seq.*)

(c) It is well to keep in view the case referred to (Boyd), as showing the danger of leaving such deeds undelivered; but whether it is to be relied on as an authority may perhaps be doubted. It does not appear very clearly from the report whether or not the first back-bond had been delivered up to B. If it had been, it makes the case all the stronger; but as the back-bond was the ground of debt, the rule *chirographum apud debitorem repertum* might in such a case be held to apply; and apart from this view, as the discharge had passed from A's hands to those of C, who was interested in its delivery, his possession might be construed as for behoof of B.

and the agent died bankrupt; Was the bond delivered? State the principle.

In this case (cited *infra*¹) it was held that the bond was a delivered document only to the extent of the £669 received by the borrower, and that as to the balance, the agent held the deed undelivered for behoof of that party; the principle of the decision being, that if no part of the money had been paid to the borrower, the depositions would have been regarded as for his behoof, for delivery to the lender on payment; while if all the money had been paid, the depositions would have been regarded as for behoof of the latter. Accordingly, as the payment had been partial, it was held that the delivery was only partial.²(*d*).

[See case of fraud by agent, *Rose*, 7 R. 925.]

65. A deed of settlement containing a clause dispensing with delivery, having been deposited with the granter's agent in a sealed packet, bearing a docquet signed by the granter, but not probative, directing that the deed should be destroyed unopened, in case of the granter dying before a certain day, and his death having occurred before that time; Was the settlement, which had not been destroyed, effectual? State the principle.

The settlement was effectual; on the principle that, as the deed contained a clause dispensing with delivery, the docquet was in effect a deed of revocation, and, being improbative, was invalid.³

¹ *Mair*, 20th Feb. 1850, 12 D. 748.

² *Logan*, 27th Feb. 1823, 2 S.

³ See also *Kyle*, 14th June, 1856, 253.
18 D. 1031.

(*d*) The case of *Mair*, here referred to, may be contrasted with *Mackintosh*, 16th Dec. 1851, 14 D. 187, 24 Jur. 81, 1 Stuart, 166, where A having employed his agent to lend money, and B having applied to the agent for a loan of £1400 on heritable security, A agreed to it, and gave the money to the agent, whereupon B, having agreed to dispense with the revival of the bond, signed it and sent it to the agent, who having stated objections to the title, B consented to take only part of the money in the meantime, which was paid to him, and the balance remained in the hands of the agent, who caused infeftment to be taken, and soon thereafter died bankrupt; and it was held that the loss fell on B.

Circumstances in which a disposition left in the hands of an agent for both parties was held to be delivered, and the property not affected by a subsequent deed dealing with it; *M'Creath*, 20th July, 1860, 22 D. 1551.

66. A having purchased an estate, takes the disposition to himself in liferent, and to B in fee. A retains the deed in his own possession ; and upon his death there is found in his repositories, along with it, a settlement leaving all his property, heritable and moveable, to C. To whom does the estate belong, and on what principle ?

The estate belongs to C ; the principle being, that if a person takes a right in name of another, and retains possession of the deed instead of making it public or delivering it to the grantee, it is within his control as real proprietor, and therefore can be disposed of under his deed of settlement. The right of B corresponds to a right under a *mortis causa* deed granted by A, and revoked by the subsequent settlement.¹(e)

67. A father, in selling land, took the purchaser bound to grant bond for the price to himself in liferent and to his sons in fee ; and he caused the sons to sign a postscript, agreeing not to call up the money for some years, but no bond was delivered, and the father granted a deed depriving his sons of the fee ; Was the deed effectual ? State the reason.

The deed was not effectual ; because the fee was absolutely and irrevocably vested in the sons, in consequence of the father having made them parties to the transaction, by causing them to sign the postscript agreeing not to call up the money.²(f)

¹ Balvaird, 5th Dec. 1816, F.C.

² Spence, 17th Nov. 1826, 5 S. 17 ; aff. 3 W. & S. 380.

(e) The disposition in Balvaird's case proceeded on the narrative that B, who was A's nephew, had paid the price, which was not the fact, and A had altered the narrative by substituting his own name for that of B, but left the destination unaltered. Where a father took a disposition to himself and his wife, and longest liver in liferent, and his daughter *nominatim* in fee, on which infeftment followed, it was held that the fee was in the daughter, and that the father could not sell without her consent ; M'Intosh, 28th Jan. 1812, F.C. In all such cases the deed should be framed so as to leave no doubt by either, in appropriate terms, restricting the right to a bare liferent, or reserving power to the liferenter to sell, burden, or affect without the fiar's consent.

(f) The bond, in the stipulated terms, in the case of Spence, had been executed, though neither it nor the disposition had been delivered. The

68. A person lending money took the bond payable to his son A, whom failing to his own heirs, but kept the document in his hands without delivery to his son ; on A's death, will B, his younger brother and executor, have action against the father for the sum in the bond ? State the reason.

No ; because the bond is within the father's control. " When a man lends a sum in name of a child *in familia*, delivery of the bond to the father has not naturally any other signification than that the bond, which comes in place of the money, is to be under his power, as the money formerly was."—*Lord Kames*.¹(g)

69. Is a decree-arbitral signed by the arbiter and placed in the hands of the clerk, delivered ?

A decree-arbitral, though placed in the hands of the clerk, is not held to be delivered, but only to contain an intended decree to become final by delivery.²(h) But after expiry of the submission, the arbiter having no longer any control over the deed, the presumption is, that it is placed in the clerk's hands for behoof of the parties. [See *M'Quaker*, 21 D. 794, where it was held that the delivery of the decree to the parties is not essential to its completion, and that it is validly issued if signed, and within the period prescribed in the submission for issuing it put by the arbiter in course of transmission for the purpose of being delivered.]

¹ *Hill*, M. 11580.

735, aff. 5 W. & S. 305 ; *Hopetoun*,

² *Macnair*, 31st May, 1827, 5 S. 6th March, 1856, 18 D. 739.

purchaser, who was in possession of the missives, had stipulated that the sons should be parties to the transaction, in order to secure him in the delay of payment of the price. The question arose between the father and the trustee for one of the son's creditors.

(g) In a prior case to that of *Hill*, here cited, an opposite judgment was pronounced ; *Hamilton*, M. 11576.

(h) This has been found also in *Ramsay*, M. 653.

IV. CAPACITY OF PARTIES TO MAKE AND RECEIVE DEEDS.

(1.) *Minors.*

70. At what age is a person capable of contracting?

A person is absolutely incapable of contracting during pupilarity, extending from birth to fourteen in males, and to twelve in females; and the powers of contracting are limited during the remainder of minority, which in both sexes ends at the age of twenty-one years.¹

71. Is a contract between a major and a pupil effectual to any extent? State the reason.

If the contract is beneficial to the pupil, it may be enforced against the major; (1) from favour to pupils, whom the law allows the power of making their condition better, though they cannot make it worse (being an exception to the ordinary rule of mutual contracts, by which both are bound or neither); and (2) *in pœnam* of those who would impose on their weakness.²

72. Enumerate the different kinds of guardians for minors.

(1.) The father—as administrator-at-law.(i)

(2.) Tutors and curators nominate—appointed by the father by will.

(3.) Tutor-at-law—appointed in right of propinquity by brieve and service retoured to Chancery.

(4.) Tutor-dative — appointed by the Crown, through the medium of the Court of Exchequer.(k)

¹ Ersk. 1, 7, 1.

² Ersk. 1, 7, 33; Fraser (Parent and Child), 151.

(i) A son in minority having succeeded to a large fortune in England, and his father having been sequestered, the trustees refused to make any payment to either of them; and the Vice-Chancellor having declined to order any payment, a petition was presented to the Court of Session by the son, with consent of his father, to remove the latter from his office of administrator-in-law, and to appoint a *curator bonis*. A curator was appointed to administer the fund, but the petition *quoad ultra* refused as incompetent; Robertson, 12th July, 1865, 3 M'P. 1077.

(k) The appointment of tutors-dative is made by the Court of Session under the statute transferring to it the duties in that respect formerly performed by the Court of Exchequer; 19 & 20 Vict. c. 56, § 19. See Wilson, 22nd January, 1857, 19 D. 286.

(5.) Curators chosen by minor—under the statute 1555, c. 35.

(6.) Factor *loco tutoris* or *curatoris*—appointed by the Court of Session on summary application.

73. By whom are granted conveyances of moveable estate belonging to pupils and minors, having tutors and curators respectively?

(1.) A conveyance of moveable estate belonging to a pupil is executed for him by his tutors, who grant it in their own name in their administrative capacity, and without the subscription of the pupil; for subscription imports consent, of which a pupil is presumed incapable.¹

(2.) A conveyance of a minor's moveables is granted by the minor himself with consent of his curators; for after puberty it is properly himself who acts, and his curators do nothing more than concur in his deeds.²

74. What is the effect of a decree against a pupil for whom appearance has been made, and defences lodged, but whose tutors have not appeared?

Such a decree is held to be in all respects like an ordinary decree in absence, though formerly it was regarded as altogether null.³(l)

¹ Ersk. 1, 7, 14; Fraser (Parent and Child), 149.

² Thomson, 21st Dec. 1842, 15 Jur. 154.

³ Ersk. 1, 7, 14.

(l) The statement in this answer is not correct. There can be no appearance *competently* made for a pupil, nor defences lodged for him, in the way mentioned. The case of Thomson, referred to, was peculiar in its circumstances, being conjoined processes of multiplepoinding, one of which had been raised on behalf of the pupil; but even there the necessity for a tutor to make the appearance effectual was stated, in reference to which Lord Moncreiff in a note observed,—“This should be remedied. Meanwhile, though no judgment can *in hoc statu* be available *contra pupillum indefensum*, it has been thought as well *valeat quantum* to pronounce the above deliverance.” Since then the point has arisen and been disposed of. An action was raised concluding against a pupil as representing his father, and against his father's trustees in that character, but not as tutors, though they had also been appointed as such, and accepted; the summons was in terms of warrant in the will executed against the pupil and his tutors and curators if he any had; but in the *partibus* there was no mention of tutors and curators. A joint defence was given in, and a great deal of procedure followed in the same form. When the

75. What is the effect of diligence at the instance of a pupil on the dependence of an action raised in the name of

pupil became major, he raised an action of reduction, on the ground "that at the date of the raising of the said action he was in pupilarity, and had no legal person or standing, and his tutors or guardians were not called or cited as parties to represent him in the said action, and no appearance was *de facto* made for them at any stage of it, nor any authorised or competent appearance for the pursuer, and no tutor *ad litem* was ever nominated or appointed to act for the pursuer, or to take charge of his interest in the matters therein put in issue, and consequently the whole interlocutors, &c., were null, and in absence of the pursuer and his tutors or guardians, and *quoad* him, and the estates to which he has right as heir of his father, are wholly nugatory and unavailing." The Court found "that the said pupil was not competently and habilely made a party to the said action,"—"that the whole of the interlocutors and procedure in the said action of count and reckoning were incompetent, and of no force or effect against the said ——— and his tutors and curators, and were not binding or availing against him and the estates to which he had right as heir of his father; that the said ——— was entitled to be reponed against the same *in integrum*," and "therefore reduce, declare, and decern in terms of the conclusion in the said supplementary action of reduction;" Craven, 9th March, 1854, 16 D. 811. The Lord Justice-Clerk (Hope), in delivering the judgment of the Court, observed—"A pupil cannot appear himself as defender. His name can only be used by those who have by the law authority to do so." Parties named to the office of tutor "could appear in their own name and for their pupil. That would have been legal appearance for him, and made him a party to the action. By himself (having no *persona standi*) he could not be made to appear." "Then the pupil was no party to the process, and the whole proceedings against him *nominatim* must necessarily be set aside." In another case, sales made of part of an entailed estate in a process raised in virtue of an Act of Parliament requiring the heirs of entail to be called as parties, were held inept, the next succeeding heir, a pupil, having been cited, but no tutor *ad litem* appointed to him; Agnew, H. of L., 31st July, 1822, 1 S. App. 333. The only competent course of proceeding against a pupil is to call him and his tutors and curators; if appearance is entered in name of the pupil and his tutors, to see that the parties appearing as such have authority to do so; if appearance be entered for the pupil alone, to inquire by whose authority the appearance is made; and if they are authorised tutors, to call on them to sist themselves; and if they fail to do so, or there be none such, or if no appearance is entered at all, to take decree in absence against the pupil and his tutors and curators. In the ordinary case, a pursuer cannot move for the appointment of a tutor *ad litem* to a pupil defender.

Where the pursuer is a pupil, the summons may be either in the name of the tutor alone, for his behoof, or in the name of both; if there be no tutor, it may be in the name of the pupil, and a tutor *ad litem* should be appointed when it comes into Court.

a pupil as pursuer who has no tutor, or a charge against a minor without charging his curators?

(1.) Diligence on the dependence of such an action is valid; a tutor *ad litem* being appointed to attend to the pupil's interest when the action comes into Court.¹ (2.) A charge against a minor is null, unless his curators are also charged.²

76. To what privileges are tutors-nominate entitled which are denied to other guardians?

(1.) Tutors nominate require no service or other judicial proceeding prior to their entering on the office.

(2.) They are not obliged to take the oath *de fidei*.

(3.) They are not obliged to find caution, unless when they are insolvent.

(4.) They may be nominated with exemption from liability for omissions, provided the deed of appointment is executed *in liege poustie*.³

77. May a father nominate tutors and curators to his children by a deed executed on deathbed?

A father may nominate tutors in the last moments of life,⁴ but he cannot on deathbed exempt them from the usual responsibility.⁵ A nomination of curators requires to be made *in liege poustie*.⁶

78. A tutor, in the course of his administration, invested a part of the pupil's moveable funds in heritable securities; and conveyed, under a compulsory sale, to a railway company, a portion of his heritable estate; Whether do the heritable securities and the price of the lands sold fall to the pupil's heir, or to his executor, after his death? State the reason.

(1.) The heritable securities fall to the pupil's executor; because the sums thereby secured were advanced from the pupil's

¹ Johnston, M. 16346; M'Neil, M. 16384.

² Ramsay, 2 Br. Sup. 627.

³ Fraser (Parent and Child), 336.

⁴ Ersk. 1, 7, 2.

⁵ 1696, c. 8.

⁶ Ersk. 1, 7, 11.

moveable funds, and a tutor cannot, by voluntary act, alter the order of the ward's succession.¹

(2.) The price of the lands sold to the railway company likewise falls to the pupil's executor; because, when the property has been changed from heritable to moveable, or *vice versa*, by the operation of law, and independently of the tutor's discretion, the succession will be regulated accordingly.²

79. Shares in a banking company belonging to a pupil, and a portion of his lands, were sold by his tutors; and after pupilarity other portions of his lands were sold by the minor himself, with consent of his curators, the sales in each case being for a full consideration, but without judicial authority; Were the sales valid?

(1.) The sale by the tutors of the bank shares was valid; because tutors have the power of disposing of the moveable property belonging to the pupil by their own authority. But the sale by the tutors of the pupil's lands was invalid; because alienations of the pupil's heritage without judicial authority are null.(m)

(2.) The sale by the minor himself of his lands after pupilarity, with consent of his curators, was valid; because alienations of heritage by a minor *pubes* are effectual unless lesion be proved.³

80. What are the grounds on which the Court authorise a sale of a pupil's heritage?

The only ground on which the Court authorise a sale of a pupil's heritage is *absolute necessity*, either from the nature of the subject, as for the prevention of loss,⁴(n) or on account of debt;⁵

¹ Ersk., 1, 7, 18.

² Graham, M. 5599.

³ Ersk. 1, 7, 17.

⁴ Muller v. Dickson, 11th Feb. 1854, 16 D. 536.

⁵ Mackenzie, 27th Jan. 1855, 17 D. 314.

(m) Although tutors cannot without judicial authority alienate the pupil's heritage, yet they may do anything relating to it to which the pupil might be compelled. Thus, they may enter vassals, and discharge heritable securities to which the pupil has right; Ersk. 1, 7, 17. If securities or conveyances of any kind are to be taken for behoof of a pupil or minor, they should be taken directly to the pupil or minor himself, and not, as is sometimes erroneously done, to the tutor or curator himself, for behoof of his ward. Taking securities in the way here directed creates no inconvenience, because, as already stated, the tutor can, if necessary, discharge them.

(n) See also Kirkland, 7th June, 1848, 10 D. 1232; Mackenzie, 27th Jan.

and the necessity for the sale must be established, not in a summary application, but by an action of cognition and sale in which the pupil's heirs and creditors are called as parties.^(o) [The Court will grant power to feu a pupil's estate only where there is "urgent necessity for the step in order to avoid loss." Clinton, 3 R. 62; Rankine, 7 R. 1032.]

81. Would the Court interpose authority to a tutor-nominate, to sell the pupil's heritage for the purpose of paying debts, the interest of which exceeded the rents? State the principle.

The Court would not interpose authority to any act of administration of tutors-nominate; on the principle, that as they do not find security for their intromissions, and are not responsible as officers of Court, they must act on their own responsibility.^{1(p)}

82. Can tutors, or minors with consent of their curators, grant leases of ordinary endurance? State the principle.

(1.) Leases by tutors, although of ordinary endurance, expire with their office, whether it be brought to an end by the death of the pupil or tutor, or his removal from office, or the arrival of the pupil at puberty; on the principle *resoluto jure dantis, resolvitur*

¹ White, 7th March, 1855, 17 D. 599.

1855, 17 D. 814; Wood, 6th March, 1856, 18 D. 732; Crighton, 13th Feb. 1857, 19 D. 429.

(o) Cognition and sale was formerly the only mode of giving authority to sell a pupil's heritage, but under the provisions of the Pupils' Protection Act, 12 & 13 Vict. c. 54, and relative Act of Sederunt, 11th Dec. 1849, the application is made by summary petition to Junior Lord Ordinary, of which examples will be found in the cases of Mackenzie, Wood, and Crighton, above quoted. See also Court of Session Act, 1857, 20 & 21 Vict. c. 56, § 4.

(p) The case of White, here referred to, was an application, not by a tutor-nominate, but by a father as tutor and administrator-in-law of his son; but the principle is the same. The judges in White's case were not unanimous, particularly with regard to the alternative application for power to borrow, which was included in the petition. This power had been granted in a previous case to tutors-nominate; Bellamy or Copland, 30th Nov. 1854, 17 D. 115; and power to sell had been granted to a tutor-nominate; Mackenzie, *supra*, p. 41, note 5. It is to be kept in view, also, with reference to the principle stated, that the power of either selling or borrowing is one which tutors cannot exercise without judicial authority. See *supra*, 79 (1).

jus accipientis.¹(r) [See Douglas, 6 M'P. 178, where the Court granted power to a father administrator-in-law for his pupil son to concur in granting a nineteen years' lease of coal-field, whereof a *pro indiviso* half was the property of the pupil.]

(2.) Leases by minors, with consent of their curators subsist till their natural expiry; on the principle, that the curators only *consent* to the lease, and are not the principals in the transaction.²(s)

83. Can persons in minority make deeds of settlement *mortis causa*?

A pupil cannot execute a deed of settlement either of his heritage or moveables. A minor *pubes* may, without consent of his curators, test on his moveable estate, however valuable, except with respect to such portions of it as are held subject to express or implied conditions not to alter. But he cannot make a settlement conveying his heritage.³(t) [Brand, 2 R. 258.]

84. What is the effect of a settlement of heritage executed in minority, the granter having attained majority and survived the *anni utiles*? State the reason.

The settlement is reducible, and will not be held to be tacitly homologated; the ground of reduction being, not minority and lesion, but that the granter had no power or capacity to grant such a deed.⁴

¹ Ersk. 1, 7, 16.

² Fraser (Parent and Child), 377.

³ Ersk. 1, 7, 33; M'Culloch, M.

8965; Yorkston, M. 8950.

⁴ M'Farlane v. Hartley, 23rd May,

1811; Fraser (Parent and Child),

342.(u)

(r) This is the rule as to the inherent powers of tutors; but in Morrison, 11th Dec. 1857, 20 D. 276, the Court authorised a factor for a minor to grant leases for nineteen years of a *pro indiviso* property, and to rebuild steading, &c., though the other joint proprietor refused to consent. In Pearson, 6th June, 1865, 3 M'P. 883, a factor *loco tutoris* was authorised to extend a lease for a year, though his office was to expire before the commencement of that year.

(s) Leases, however, like sales by minors, would be liable to challenge on the ground of lesion.

(t) See as to a minor's powers with regard to settlement of heritage, Cunynghame, M. 8966, where it was found that he could not dispoise heritage *mortis causa* even with consent of his curators. The cases of M'Culloch and Yorkston, cited, involved questions of the right of the parties to defeat substitutions in deeds under which they themselves had succeeded.

(u) Hume's Session Papers, "Summer, 1811," No. 19.

85. What is the *quadriennium utile*?

The *quadriennium utile* is the space of four years which the law indulges to a minor "after his perfect age, within which he can sue for the reduction of any deed he may have granted for his own prejudice while he was yet a minor, that so he may have a reasonable time from that period in which he is first presumed to have the exercise of reason, to consider with himself what deeds granted by him in his minority are truly hurtful to him."¹

86. A minor, with consent of his father, executes two gratuitous conveyances, the one in favour of his father, and the other in favour of his uncle; How long does his right of challenging these deeds subsist?

(1.) As no curator can be *auctor in rem suam*, the conveyance in favour of the father is to be regarded as the deed of the minor alone, without the concurrence of his curator. It is therefore null *ipso jure*, and may be challenged at any time within forty years; the ground of reduction being, not the privilege of minority, but a right to set aside a deed which has never been validly executed.²(x)

(2.) The conveyance in favour of the minor's uncle must be challenged within the *quadriennium utile*; the grantee being a stranger, and the deed having been granted by the minor with the concurrence of his curator.(y)

87. A minor having curators, without their consent grants a

¹ Ersk. 1, 7, 35.

and Child), 371; Manuel, 15th Jan-

² Ersk. 1, 7, 19; Fraser (Parent

uary, 1853, 15 D. 284.

(x) There is a decision (Bannatyne, M. 8983) where an assignation by a son to his father, not having been challenged within the *quadriennium utile*, was sustained; but the circumstances are so special that it can hardly be said to conflict with the other cases cited, in conformity with which see M'Kenzie, M. 8959; Thomson, M. 8935.

(y) On this principle, a distinction should perhaps be taken between uncles and uncles in affinity, the former being held to be conjunct (Tarpersie, M. 900), and the latter not (Elibank, M. 12569). In Manuel, cited above, the deed was in favour of an uncle consanguinean; but the ground of reduction was that the bond was for the father's behoof, which was held to infer nullity, and therefore to be pleadable though the *anni utiles* had expired. The rule in the text is therefore not to be taken absolutely.

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perty ; because real rights completed by registration in the person of the original creditor, and acquired by an onerous purchaser on the faith of the records, are secure against reduction, unless the right has been rendered litigious by action prior to the purchase.¹

90. Are bills granted by curators alone, without the concurrence or knowledge of the minor, relative to ordinary matters of administration, valid items of charge against the latter in accounting with his curators? State the reason.

Yes ; because the meaning of the rule requiring the minor's concurrence to every transaction is, "that no solemn or important obligation can be undertaken, such as granting a bond, without the concurrence of both, but not that trifling and unimportant transactions, such as the contraction and payment of ordinary debts, require to be sanctioned by the same formality."²

91. Is it necessary, in applications under the Entail Amendment Act, that tutors *ad lites* be appointed to pupils who have tutors-at-law? State the reason.

Yes ; because the Entail Amendment Act confers more extensive powers than tutors have at common law, such powers being necessary to carry out the purposes of the Act.

(2.) *Married Women.*

92. Distinguish between the *jus mariti* and the husband's right of administration.

(1.) The *jus mariti* gives the husband an absolute personal right to the moveable property belonging to the wife at the marriage, or which shall be acquired by her during its subsistence, the same being transferred to him by the assignation implied in the marriage.

(2.) The husband's right of administration is derived from his office of curator, as guardian of his wife's person and property. It entitles him to levy the rents of her heritable estate, and prevents

¹ Ersk. 1, 7, 40.

² Stark v. Tennant, 2nd July, 1846, 8 D. 1001, p. Lord Jeffrey, *in fin.*

her disposing of her property, whether heritable or moveable, without his consent.¹(a)

93. Whether is the husband's right to the wife's moveable estate derived from his *jus mariti* or his right of administration? State the reason.

The husband's right to the wife's moveable estate is derived from the *jus mariti* in virtue of the assignation implied in the marriage; because any moveable subject which, after the wife's death, may be discovered to have belonged to her, falls to the husband, which it could not do if his right were barely that of administration, terminating like other curatorial rights by the death of the party.²

94. What subjects belonging to the wife do not fall under the *jus mariti*?

(1.) The wife's heritable estate; but the husband has right to the rents and interest.

(2.) Personal bonds, after the term of payment, if they bear interest.

(3.) Bonds with a clause of infeftment.

(4.) Rights having a tract of future time.

(5.) The price of the wife's land sold, being a *surrogatum* for the lands.

¹ Ersk. 1, 6, 13-19 and 20; Menzies Lect. 36 (38).

² Ersk. 1, 6, 13.

(a) By 24 & 25 Vict. c. 86, § 16, it is provided that "When a married woman succeeds to property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband, or his creditors, or any other person claiming under or through him, shall not be entitled to claim the same as falling within the *communio bonorum* or under the *jus mariti* or husband's right of administration, except on the condition of making therefrom a reasonable provision [As to what is a "reasonable provision," see Sommer, 9 M. 954; Taylor, 10 M. 23; Ferguson, 10 M. 54.] for the support and maintenance of the wife, if a claim therefor be made on her behalf; and in the event of dispute as to the amount of the provision to be made," the same shall be settled by Court of Session in an ordinary action, according to circumstances, previous provisions secured, and separate property, if any; but such claim must be made before the husband or his assignee or disponee shall have obtained complete possession of the property, or before a creditor has done complete diligence against it by adjudication or arrestment and forthcoming or poinding and sale.

(6.) The wife's alimentary provisions.

(7.) The wife's *paraphernalia* and *peculium*.¹

[(8.) By "The Married Women's Property (Scotland) Act, 1877," the *jus mariti* and right of administration are excluded from the wife's wages gained by her in any trade in which she is engaged, or in any business carried on by her in her own name, and are also excluded from any money or property acquired by her through the exercise of any literary, artistic, or scientific skill.]

95. What is the effect of a personal obligation by a married woman? State the principle.

A personal obligation by a married woman is null ;(b) on the principle (1) of protecting wives from imposition ; and (2) that her person, being sunk in that of her husband, is not a proper subject of obligation.²

96. What exceptions have been admitted to the rule, that a wife is incapable of contracting a personal obligation?

(1.) The wife's personal obligation for money *in rem versum*, may warrant diligence against her separate estate, but not against her person.³

¹ Bell's Prin. 1549 *et seq.*

² Ersk. 1, 6, 25.

³ Bell's Prin. 1612, and cases cited.

(b) According to two cases, to be immediately noticed, the rule is here laid down too absolutely, and should rather be stated thus :—"The obligation of a married woman is of no legal effect if she, or those in her right, plead that nullity," and not "that it is of itself absolutely incapable of affording a good *prima facie* ground of action ;" *per* Lord Fullerton in Thomson or Hunter, 11th Feb. 1840, 2 D. 564. In that case a decree of adjudication led on a bill of exchange was sustained (but only as a security, no feudal title having been made up), though it appeared *ex facie* of the bill, and decrees of constitution and adjudication, that the bill was granted by a married woman. The heir against whom the proceedings were taken had renounced the succession, and possession for seventy years had followed before the reduction was raised. In delivering his opinion, Lord Fullerton referred to Watson v. Bruce, 19th July, 1672, M. 5964 and 3537, where a wife having become cautioner for her husband, he granted an assignation to a third party in relief of an obligation undertaken by him and of that by the wife, and she having sued the assignee for her relief, he pleaded that her obligation was null, and therefore there was *quoad* her no debt to demand relief of ; but the Lords found "that the pursuer might forbear to make use of her privilege as a wife, and insist for her relief as a cautioner."

(2.) During separation, legal or voluntary, the wife's personal obligations are effectual against a fund settled by the husband for her maintenance.^{1(c)}

(3.) When the husband is abroad, and the wife carries on a separate trade, her obligations may warrant diligence even against her person.²

(4.) With consent of her husband, she may grant mandates and other deeds relative to her separate property and obligations to sell her heritable estate, but not to the effect of binding her person.³

(5.) The wife's obligation as *præposita* is effectual, but only against her husband.⁴

(6.) She is bound to indemnify for damage occasioned by her delict.⁵

(7.) [When she is possessed of a separate estate from which her husband's *jus mariti* and right of administration are excluded, she may invest the same in trade, and thereby incur personal obligations effectual against that separate estate. Biggart, 6 R. 470.]

97. May a married woman, with or without the consent of her husband, validly grant a bond to take effect after her death?

It is laid down by Erskine⁶ that a married woman may, even without the consent of her husband, become bound for a sum of money in the form of a deed, *inter vivos*, if it be not to take effect till after her death; and the same doctrine is stated in the authorities cited *infra*.⁷ But it was strongly impugned by several of the

¹ Bell's Prin. 1612; Menzies Lect. 38 (38).

² Churnside, M. 6082; Orme, 30th Nov. 1833, 12 S. 149.

³ Bell's Prin. 1612.

⁴ Bell's Prin. 1613.

⁵ Bell's Prin. *ib.*

⁶ Ersk. 1, 6, 28.

⁷ Bell's Prin. 1613; More's Notes to Stair, 18 (13); Menzies Lect. 38 (39).

(c) During the subsistence of an order of protection, made and intimated under "The Conjugal Rights (Scotland) Amendment Act, 1861" (24 & 25 Vict. c. 86), a wife may contract obligations and sue and be sued as if she were not married.

Some of the exceptions stated in the answer can hardly be said to be cases of a wife contracting a personal obligation.

consulted judges in the case of *Miller v. Milne's Trustees*,¹ in which it was stated by Lord Ivory that the obligations in question are such "as no married woman can contract without the consent of her husband, as curator, or could contract even *with his consent*. If the personal obligation itself is a nullity, it makes no difference that there is *morata solutio*. But it is said that the case of *Colquhoun*² draws a distinction betwixt an obligation in general terms, and an obligation which is not prestable until the death of the husband, on the ground that, in the latter case, the husband's interest is not affected. I do not think that the principle which regulates the personal obligation of a married woman depends upon the interest of the husband at all. The principle, as laid down in all the authorities, is, that the obligation is an absolute nullity; that the person of the wife is sunk in that of the husband, and cannot maintain a personal obligation, not merely so far as it might subject her to personal diligence, but even to the effect of attaching her estate."(*d*)

98. A married woman disposes her heritage by a conveyance not signed by her husband, but reserving his rights; What is the legal effect of the conveyance? and state the principle.

The conveyance is null; because he is her guardian, for security of herself and her heirs, as well as for his own right.³

¹ *Miller*, 3rd Feb. 1859, 21 D. 377,
31 Jur. 209.

² *Colquhoun*, M. 5973.
³ *Ersk.* 1, 6, 27.

(*d*) On the other hand, the Lord President (M'Neill) said:—"I still entertain my old opinion, that it was competent for Mrs. Milne to enter into that obligation, and I formed and hold that opinion on the authority of nearly all our institutional writers. I find it in *Erskine and Bell*, and I think it is to be found in Professor More's edition of *Stair*, and I find that the doctrine was taught from the Chair of Conveyancing; in short, that for a century back it has been treated as part of the settled law of the country." It may be observed that this case was sent by the First Division to the rest of the Court for opinion, and that both the Lord President and Lord Ivory observed that the question of the competency of such an obligation had been rather left out of view by the consulted judges, the Lord President stating,— "We have unfortunately little aid from the consulted judges, who have gone upon the view of deciding the case independently of that question altogether." The point therefore is perhaps not to be held as quite settled.

99. A married woman executes a personal bond, with consent of her husband, and she ratifies it upon oath; What is the effect of the deed, and upon what principle?

The bond is null; the principle being, that an action cannot be sustained on a null obligation, effect ought not to be given to it, although ratified by the granter upon oath; because no pactio of a private party can constitute a rule of judgment by which a public law would be eluded.¹(e)

100. A woman granted two bills, one before marriage, and the other afterwards, the second being a renewal of the first; Is she or her husband liable for the amount?

Neither the husband nor the wife is liable; because the first was discharged, and the second, although a renewal, being granted after the marriage, could create no obligation.²(g)

101. May a married woman validly execute a *mortis causa* settlement without her husband's consent? State the reason.

A married woman may validly execute deeds *mortis causa*,

¹ Ersk. 3, 3, 60.(f).

² Balfour, 5th March, 1831, 9 S. 558.

(e) A somewhat contrary doctrine is laid down by Erskine, 1, 6, 27, where he says,—“Nay, though the obligation” (by a wife, with consent of her husband) “be in its form merely personal, yet if by a back-bond or defeasance of the same date it shall be restricted to her heritage, it will be effectual, Jan. 23, 1678, Bruce (*Dict.*, p. 5965), for by such back-bond the nature of the obligation, of which the back-bond makes a part, is in effect changed, and continues no longer personal;” but Lord Ivory, in a note to that passage, refers to an observation by Fountainhall, M. 5966, “that the decision deserves to be again considered.”

(f) A v. B, M. 5965; Watson, 5976.

(g) There is an element in this answer—viz., the discharge of the first bill, which is not in the question. It appears from the report that the discharge was alleged, and the fact of the second being a renewal denied, but it is not stated how these allegations were disposed of. Had the first bill been found to be still subsisting, the judgment would probably have been different, on the ordinary principle of a husband's liability for his wife's debts contracted before marriage.

disposing of her separate estate, either heritable or moveable, without her husband's consent; because the husband has his curatorial powers, not in consequence of the wife's unripeness of judgment, but partly for his own benefit, and such deeds neither can effect his interest, nor have any operation till his *potestas maritalis* is at an end.¹ But no legacy, or bequest, or testamentary disposition by a married woman, of any portion of the goods in communion, is effectual.²

102. A husband raises an action for his wife's *legitim* in his own name and without her consent; Is the action competent? State the reason.

The action is competent; because *legitim* is a right which vests, *ipso jure*, on the death of the father, and, when not discharged by a daughter before marriage, is transferred to her husband, who is therefore entitled to sue for it without using her name and without her consent.³(h) [See as to claim for wife's *legitim* by husband's executor, Millar, 4 R. 87.]

103. What is the proper form of a bond and disposition in security by a husband and wife, burdening her lands for his debt?

The personal obligation is undertaken by the husband alone, and the conveyance in security thereof is granted by the wife as the principal party, with consent and concurrence of her husband, for his own interest and as taking burden on him for her.⁴

¹ Ersk. 1, 6, 28.

² 18 Vict. c. 23, § 6.

³ Macdougall, 20th Feb. 1858, 20 D. 658.

⁴ Jur. Styles, i. 403; Smith, 10th Jan. 1828, 4 Mur. 400.

(h) There are exceptions to this rule. Thus, where an election was to be made between *legitim* and a provision in favour of the wife in liferent and her children in fee, exclusive of the *jus mariti* of the husband, she was found entitled to appear and to claim the provision in opposition to her husband and his creditors; Stevenson, 7th Dec. 1838, 1 D. 181. See also Lowson, 15th July, 1854, 16 D. 1098. The rule seems to be, that where the provision as well as the *legitim* falls under *jus mariti*, the husband cannot be controlled in his election; but where there is an independent or adverse interest in the wife, she is entitled to claim the protection of the Court, though she will not be allowed capriciously to exercise her choice in order to defeat creditors.

104. Two heritable bonds having been granted by a husband and wife, over her estate, for debts due by the husband, the creditor in the one raised and completed an adjudication of the wife's lands, upon her obligation ; and the creditor in the other expedite resignation and infeftment therein, in virtue of the procuratory contained in his bond, for resigning the lands in security granted by the wife with her husband's consent ; Are the securities, or either of them, effectual ?

(1.) The adjudication is null ; the principle being, as stated by Lord Pitfour, that an adjudication proceeds on this, that the debtor has become bound to pay, and has neglected to fulfil his personal obligation ; but there can be no personal obligation on the wife, and therefore an adjudication cannot proceed against her lands.¹

(2.) The resignation and infeftment in security are effectual ; for although the heritable bond is null as to the wife's obligation for the money, she may, with consent of her husband, grant mandates and other deeds relative to her separate property, and the bond is therefore valid, as containing a procuratory for resigning her lands in security of her husband's debt.²

105. A woman, before marriage, grants an onerous assignation of a personal bond in her favour, but the assignee neglects to complete his right by intimation to the debtor before the marriage of the cedent ; Is the assignation effectual in a question with the husband claiming the contents of the bond in virtue of the assignation implied in marriage ? State the reason.

Yes ; because the husband is by marriage liable for the wife's moveable debts ; and since the assignation granted by a woman before her marriage implies warrandice against her, that obligation of warrandice is a moveable debt due by her to the assignee, with which the right the husband had acquired by the marriage was burdened ; so that he cannot plead upon his legal assignation in prejudice of that warrandice.³(i) [The Married Women's Property Act, 1877, limits the husband's liability for his wife's antenuptial

¹ *Watson v. Robertson*, M. 5976.

² *Ersk.* 3, 5, 7.

³ *Eleis*, M. 5987 ; *Watson v. Henderson*, 9th July, 1802, *Hume*, 208.

(i) This principle, however, would not exclude the husband's "creditors

debts to the value of property received by him through her before, at, or subsequent to the marriage.]

106. By what means may the power of selling her heritage, without her husband's consent, be conferred on a married woman?

Such a power may be conferred on a married woman by the husband renouncing his *jus mariti* and right of administration by antenuptial marriage-contract; or by third parties excluding these rights in conveyances by them in favour of the wife.¹(k)

¹ Ersk. 1, 6, 14.

attaching the fund assigned by the marriage, or having right by sequestration. The assignee, without intimation, would be there postponed in respect of the real right preserving his claim of warrandice as a personal debt." Bell's Com. ii. 18.

(k) The rule stated is hardly to be relied on. The precautions here suggested, though sufficient to protect the wife's property against the debts of the husband or the diligence of his creditors, do not meet the difficulty arising from a wife's peculiar position, that she has no *persona standi*, and can do nothing without her husband's concurrence. An illustration of this may be found in the case of Dick, House of Lords, 12th Dec. 1826, 2 W. and S. 522. Here a husband bought property, and took the title to his wife, and thereafter became bankrupt, and fled the country. The usual decree of adjudication was pronounced in favour of the trustee, and the bankrupt was ordained to grant all necessary conveyances in implement thereof. The wife executed a disposition in favour of the trustee, proceeding on the narrative that the property had been purchased with her husband's money while he was insolvent, and that therefore her title was reducible. The trustee thereafter sold the property, and the purchaser having refused to take the title, an action was raised to try its validity, and it was held in the H. of L. that it was not good. It was there pleaded by the purchaser that "a disposition by a married woman, without consent of her husband, is inept, and consequently the conveyance to the trustee is null and void;" and the Lord Chancellor (Eldon) observed,—“I think the opinions of the judges are quite enough to show that it is not a good title.” The case had been decided in the Court of Session, on the construction of a condition in the sale, under which it was held the purchaser was bound to take the title as it stood, and hence effect had not been given to the objection. The case of Rennie, H. of L., 25th April, 1845, 4 Bell, 221, may also be referred to, though there was there the specialty that the fund assigned, from which the *jus mariti* was excluded, was alimentary. The only certain mode of effecting the object referred to is through the medium of a trust. See opinions as to power of wife to convey to husband, notwithstanding exclusion by third parties of *jus mariti*, &c., Napier, 18th Nov. 1864, 8 M.P. 57.

[See as against the doubts expressed in the note Biggart, 6 R. 470, specially the review of the law in Lord Deas' opinion.]

107. May a married woman act as a testamentary trustee and *sine qua non*, and as tutor or curator?

A married woman may act as a testamentary trustee and *sine qua non*, independently of her husband; on the ground that there is no sinking of the rational person by marriage.^(l) The husband may object but he must do so *in limine*; otherwise he will be held to have renounced his control, and cannot be allowed to interfere as to particular acts. But the wife *qua* trustee cannot proceed judicially without the concurrence of her husband.^(m) She cannot act as tutor or curator.¹⁽ⁿ⁾

108. A married woman, with concurrence of her husband, and without undue influence, grants a disposition of her heritage in security of her husband's debt, but she refuses to ratify it; Is it valid?

The deed is valid; because ratification is not indispensable to validate a deed by a married woman, the effect of that formality being only to secure it from challenge, on the ground that it was granted through force, or fear, or undue influence on the part of the husband.^{2(o)}

109. A deed by a married woman, bearing to be granted with consent of her husband, and to be duly ratified, is challenged on the ground that it was both granted

¹ Bell's Prin. 1612.

² Menzies Lect. 39 (40); Buchan, 1st March, 1834, 12 S. 511.

(l) So found, Stoddart, 30th June, 1812, F.C. A husband and wife being both named trustees, the wife is entitled to act and vote separately from her husband; Watson v. Darling, 14th Jan. 1824, 2 S. 607, H. of L., 1 W. & S. 188.

(m) See Laird, 16th Nov. 1833, 12 S. 54.

(n) This question raised in Stoddart, note (l), *supra*.

(o) In a reduction by a wife of an unratified conveyance, to which she was a party, of property belonging to her husband, in the liferent of which she had been secured by antenuptial contract, a proof before answer was allowed of averments of *essential error*; Priestnell, 20th Feb. 1857, 19 D. 495.

Opinion that in an instrument of disentail by a wife in her own favour, ratification was unnecessary, but authorised *ob majorem cautelam*; Brisbane, 1st March, 1850, 12 D. 917.

and ratified under compulsion of the husband ; Is the challenge competent ?

It is held by Erskine¹ that a ratification, made under the same compulsion with the deed itself, ought to be reducible as would have been the deed unratified ; but this doctrine is impugned by Professor G. J. Bell, who holds that ratification affords a complete defence, "unless the party taking benefit by the deed should be proved to have been participant in the violence ; or at least had notice of the compulsion under which the deed was granted and the ratification made."² [This point is not a settled one. See Menzies, p. 41, and case of M'Neill there cited.]

(3.) *Insane Persons, &c.*

110. An insane person grants a conveyance of his heritage before he is cognosced, but after the date of the commencement of the insanity as fixed by the inquest ; What is the effect of the deed, the grantee having been ignorant of the cognition by the inquest, (p) and having believed the granter to be sane ?

The deed is null ; the Statute 1475, c. 66, declaring that all alienations made by a person cognosced after the time fixed by the inquest as the commencement of his insanity should be of no avail, as well as alienations made after the serving of the brieve.³ (r)

¹ Ersk. 1, 6, 34.

² Moncrieff, M. 6286.

³ Bell's Com. i. 138.

(p) There is probably a misprint here, the cognition being supposed to be *subsequent* to the conveyance.

(r) The rule, according to Professor G. J. Bell, is not so absolute as here stated. The trial is *ex parte*, and the verdict is not conclusive either way. It authorises guardianship, and gives the guardian the aid of the presumption arising from the inquiry, but a deed granted before the time so fixed may, on competent evidence, be reduced, while one granted after it may stand, and a deed may be challenged though the trial may not have issued in a verdict of insanity. The rule seems to be, that while a person of mature age is presumed to be of full capacity, a verdict of insanity inverts this presumption, and raises the opposite one of incapacity. See Bell's Com. i. 137 ; and Hay, July, 1810, there referred to, note 1. In that case, a person having in 1805, after public advertisement, sold an estate to a stranger for a full price, was cognosced in 1807 by a verdict which found that he had been insane in the end of 1804, and that he was so on 7th January, 1807, and had continued so till, and was so at,

111. State a good rule of practice as to the framing and execution of deeds of settlement which might be exposed to the risk of being challenged on the ground of facility?

(1.) The deed ought to be in a simple form, and easily intelligible, as such a deed might be effectual, while one by the same party of an elaborate nature, and containing complicated provisions, might be reduced.¹ [Nisbet, 9 M'P. 937.]

(2.) Care should be taken to explain the nature and effect of the deed, and to ascertain that the party knows its meaning.

(3.) The party's medical attendant should be present at its execution, and be one of the instrumentary witnesses.

112. How is judicial and voluntary interdiction of profuse persons imposed?

(1.) Judicial interdiction is imposed by the Court of Session, upon an action brought against the prodigal at the instance of his heir or next-of-kin or (it is said) by any of his relatives;² the judgment finding and declaring him to be weak and facile, interdicting him to persons named, prohibiting him from selling his lands or from contracting debt whereby they might be adjudged, and declaring such deeds null.

(2.) Voluntary interdiction is imposed by the party himself by bond or other writing, expressing the granter's weakness, and binding himself to certain persons that he shall not, without their consent, grant any deed.

(3.) Letters of publication are issued on the bond or decree, and published at the market-cross of the head burgh of the person's residence; and they must be registered within forty days in the General Register of Inhibitions, or in the Particular Register for the county in which the lands are situated.³ [Particular Registers of Inhibitions are now abolished.]

¹ Watson, 18th Nov. 1825, 4 S. 200;
aff. 29th June, 1827, 2 W. & S. 648.

² Fraser (Parent and Child), 559.

³ Ersk. 1, 7, 54 *et seq.*

the date of the verdict; and the question was, whether the verdict was not equal to one of sanity during the omitted interval. The Court held that it was not, and allowed a proof, whether there was insanity at the time of bargain. See also Morrison, 20th Dec. 1841, 4 D. 337, where a deed granted in 1837, and while the curatory still subsisted, by a person who had been cognosed in 1835, was sustained.

113. What is the duty of interdictors, and how do they incur personal responsibility?

The duty of interdictors is to judge of the propriety of deeds by the interdicted person ; and all that they are answerable for is their fault or fraud in consenting to prejudicial deeds.¹

114. What kinds of deeds granted by an interdicted person alone, without consent of his interdictors, are unchallengeable?

- (1.) Onerous or rational deeds, affecting his heritage.(s)
- (2.) All deeds, whether onerous or gratuitous, relative to moveables. But gratuitous personal obligations are reducible in so far as they may be the ground of diligence against his heritable estate.
- (3.) Dispositions *mortis causa*, whether of heritage(t) or moveables.²

115. Where an interdicted party sells his heritage for an inadequate consideration, and without consent of his interdictors, what is his remedy? And what is his remedy if the interdictors have consented?

In the former case, an action of reduction of the disposition is the proper remedy ; and in the latter, a personal action against the interdictors, to make up the loss occasioned by the inadequate consideration.³

116. Where the heir of an interdicted person takes up the heritage on the death of his ancestor, but does not represent him as heir *in mobilibus*, is he liable upon his ancestor's personal obligations contracted after interdiction? State the reason.

¹ Ersk. 1, 7, 59.

² Ersk. 1, 7, 58.

³ Ersk. 1, 7, 59 ; Bell's Prin. 2127.

(s) A deed by the interdicted party in favour of one of his interdictors, for an onerous and rational cause, sustained ; Kyle, 14th Dec. 1826, 5 S. 128.

(t) It is stated by Erskine (1, 7, 58) that an interdicted person "can make no settlement of his heritable estate, nor alter any former settlement upon the most rational grounds, either with or without his interdictor's consent ;" but the case referred to (Tenant, M. 7127) was one of a revocable settlement, failing heirs of the granter's body, in favour of the interdictor, who was held barred *personalis exceptione* from accepting it.

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the Court is of deeds on the of execution, was

aid to one of intoxi- because he be induce- taken of the ustified ;(y) by intoxica- to effect of

8.

to be for money ad- pem causam, and B court, at the suit of A, State the principle.

repetition of the sum recognised as a ground al consideration, yet, if estitution cannot be en-

Clayworth, 1811, 1 8 jr. 12 ; Bell's Ill. i. 17.

26.

is at the time incapable of con- ne, 1803 ; Hume, 684 ; Hunter, July, 1839, M.F. 278.

forced, the regulating maxim in such cases being *melior est conditio possidentis vel defendentis*.¹(a)

119. What is the effect of conditions annexed to provisions that the grantee shall marry only with the consent of persons named by the granter?

(1.) Where the provision is the result of a natural obligation, as by a parent to a child, and does not exceed the grantee's legal claims, the provision will be due though the condition be unimplemented.(b)

(2.) Where the provision is in addition to the child's legal claims, the condition will generally be effectual.

(3.) Where the provision is by a stranger, under no legal obligation, the condition will be strictly interpreted, and must be fulfilled, unless it amount to an absolute prohibition to marry, in which case it is regarded as *contra bonos mores*.

(4.) Where the grantee has transgressed the condition in ignorance of its existence, the provision will be due; at least in the case of provisions by parents to children.

(5.) Although the grantee should marry without asking the consent of the parties, their subsequent approbation will obviate the forfeiture of the provision.(c)

(6.) There must be a good cause for refusal of consent, and there must be a reason assigned, otherwise the provision will be due, notwithstanding the non-fulfilment of the condition.(d)

¹ A v. B, 26th May, 1816, F.C. ; Bell's Prin. 35.

(a) The case here referred to was remitted by the H. of L. for review, but on a point not touching the principle stated.

(b) This rests rather on the principle that a parent cannot defeat a child's legal claims.

(c) So found, Wellwood's Tra., 21st June, 1851, 13 D. 1211.

(d) A father by his trust-deed declared "that in case any of our said children shall marry, or otherwise conduct themselves so as not to merit the approbation of my said trustees, or a majority of them, accepting and surviving at the time, the provisions hereby made in favour of said children so marrying or acting shall only belong to them in liferent, for their liferent use alienarly, and to their issue or heirs above mentioned in fee. But it is hereby declared that a regular minute must be entered in the sederunt-book of the trustees expressing their disapprobation of the conduct of any of my said children to restrict them to a liferent as aforesaid." On occasion of the eldest son's

(7.) The conditions imposing an absolute prohibition to marry are unlawful, and in provisions are consequently held *pro non scriptis*.^{1(e)}

¹ Bell's Prin. 39 and 1785 ; Menzies Lect. 58 (59) ; and cases there cited.

marriage, the trustees by a minute approved thereof ; but three years afterwards, just before he attained the age of twenty-five, at which time the provision for the settlement of the father's landed estate was to take effect in his favour, the trustees by another minute recorded that they had " proceeded to review the conduct of Mr. Robert Ker, the eldest son of the late Mr. Ker, since his father's death, and, after mature and deliberate consideration, were unanimously of opinion that the said Robert Ker, had so acted and conducted himself as not only not to merit the approbation of the trustees, but to call forth their strongest disapprobation ;" " and therefore they do hereby declare that the provisions made in favour of the said Robert Ker by the said trust-disposition shall only belong to him in liferent, for his liferent use alienably." This exercise of the power given to the trustees was sustained, and the Lord Ordinary, in his note, observed, with reference to the minute : " It does not, indeed, set forth the special grounds of disapprobation. But the trust-deed does not require this. The discretionary power bestowed on the trustees was undoubtedly very large, and such a power may conceivably be used very capriciously. But the grant of it is not illegal or incompetent. The truster was legally entitled to do what he did, which was just to place the trustees named by him in the same position in respect of power in which he stood himself. Such a delegation is a lawful act, and a court of law must give effect to it whatever they may think of its policy." The condition as to marriage was not here in question, but the principle of the decision may apply equally to it ; and if so, the necessity for assigning a reason for withholding consent may depend on the terms in which the condition is conceived ; though it was held necessary to give a reason, Pringle, M. 2972 ; but there the objector was personally interested. In reference to one of the cases on this subject (Ommanney, Douglas' Tr., 17th Dec. 1793, H. of L., 15th March, 1796, 3 Pat. App. 448), it is to be kept in view that the reversal of the judgment of the Court of Session, and the giving effect to the condition, proceeded on the ground that the deed was to be construed according to the law of England, and that it was a mere revocation of the bequest.

In Fraser, 18th July, 1849, 11 D. 1466, a condition that a provision by a father to his daughter should be forfeited if she resided with her mother, whose conduct was not impeached, was disregarded.

(e) In connection with this subject, reference may be made to Leith, 25th Jan. 1853, 2 Stu. 197, where a widow, on the narrative that the provision for her children was inadequate, executed a deed conveying her whole property to trustees for their behoof, in the event of her second marriage or death ; two years afterwards she executed and recorded a duplicate of the deed. Held by Lord Rutherford, in a reduction at her instance, that the deeds were irrevocable, and carried the fee, but not the liferent, of her property.

120. May a *spes successionis* be sold or adjudged?

A *spes successionis* may be sold, although such sales were reprobated by the Roman law, and are viewed with disfavour by the law of England.¹ But it has been held that a *spes successionis* cannot be adjudged; because there is no right vested in the heir capable of adjudication.²

121. On what principle are obligations arising out of wagers not actionable at law?

Such obligations are not actionable; on the principle, that "Courts of Justice were instituted to enforce the rights of parties arising from serious transactions, and can pay no regard *sponsionibus ludicris*."³

122. A brings an action against B for a picture, won by his dog at a coursing match; A alleging that he gave B a mandate to run his dog for him, and B maintaining that he borrowed the dog to run for his own behoof; Will the Court entertain the action?

Such an action is competent; the reason being, that although the Court will not interfere in the question as to which dog had won, it will decide whether the prize belonged to the owner of the dog or to the party who named it for the match, as that is a question, not of racing, but of mandate or loan.⁴ [See *Calder*, 9 M.P. 1074, where the owner of a horse, which had admittedly won a race, got decree against the stakeholder for the amount of the stakes, repelling a plea that the action was incompetent as brought to recover a gaming debt.]

123. What is the effect of a bill granted to facilitate a bankrupt's discharge, and of one for a gambling debt, both being in the hands of a *bona fide* onerous indorsee?

¹ Aikenhead, M. 9491.

³ Wordsworth, M. 9524.(f)

² *Beaton v. Macdonald*, 7th June, 1821, 1 S. 48.

⁴ *Graham*, 5th Feb. 1848, 10 D. 646.(g)

(f) See also *O'Connell*, 23rd Nov. 1864, 3 M.P. 89.

(g) The action in this case was conjoined with a multiplepointing at the instance of the stakeholder.

(1.) A bill granted to facilitate a bankrupt's discharge is absolutely void under the Bankrupt Act;¹ and as a *vitium reale* attaches to it, the bill is null even in the hands of a *bona fide* onerous indorsee. (h)

(2.) The Act 9 Anne, c. 14, declares that all bills, &c., granted

¹ 19 & 20 Vict. c. 79, § 150.

(h) This, of course, applies only to cases of sequestration under the Act. The prior statute, 2 & 3 Vict. c. 41, § 124, contained a similar provision, to which effect was given in *Macqueen*, 27th May, 1852, 1 Stu. 745, where a party attempted to enforce an obligation by a bankrupt to grant a bill as a condition of the creditor concurring in his discharge on composition. Whether such bills are absolutely null in the hands of *bona fide* onerous indorsees does not seem to have been decided. The case is probably analogous to that of bills, &c., granted for gambling debts under the Act of Queen Anne, referred to in the second branch of this answer, the decisions as to which were not uniform. See *Neilson*, M. 9507; *Stewart*, M. 9510; and *Ferrier*, 16th May, 1828, 6 S. 818, where claims under such obligations were sustained; and *Pringle*, M. 9509; and *Hamilton*, 18th May, 1832, 10 S. 549, where they were rejected. See also *Bell's Com.* i. 312. The rule of nullity, as against onerous indorsees, does not apply to the case of bills granted for concurring in a discharge under a private arrangement, as will be seen below.

Bills granted by bankrupts for sums over and above the amount of composition offered to induce creditors to accept of such composition, and to concur in the discharge, are illegal at common law; *Macfarlane*, 14th Dec. 1864, 3 M.P. 237. In this case some points were decided which are worthy of attention; and first, such bills cannot be enforced to any extent at the instance of the original grantee. Lord Deas, who delivered the judgment of the Court, observed:—"Now, the law seems to be clear that in so far as money agreed to be paid as an illegal preference of this kind is still unpaid, payment cannot be exacted by the party to whom the preference was given." Second, that an onerous *bona fide* indorsee can enforce "payment of the bill from the insolvents, and that their defence, that it was an illegal preference, could not have availed them in a question with him." But third, if such bills are "paid through concussion, the money may be recovered back" from the original grantee; concussion meaning, not necessarily that steps are taken to enforce payment, but that the money "is paid to a party" (such as an onerous indorsee) "who is in such a position that he can legally and effectually compel payment;" and fourth, payments voluntarily made to the original grantee cannot be recovered back, a renewal of the bills making no difference in this respect; and bills, though paid through a bank, if only handed to the bank for recovery, and not discounted, are to be held as voluntary payments, the bank in such circumstances not being in a position to compel payment. In this case it was also held, as it had been in *Arrol*, 24th Feb. 1826, 4 S. 499, that the trustee in a subsequent sequestration may prosecute for recovery of such claims in right of the insolvent, and that they cannot, if unpaid, be ranked on the estate.

for gambling debts should be deemed fraudulent and void ; but the Act 5 & 6 Will. IV. c. 41, repeals the nullity, and enacts that such bills shall only be deemed as granted for an illegal consideration ; the effect of which is, that they are effectual in the hands of a *bona fide* onerous holder, to whom the same have been indorsed before they became payable,(i) the party who pays having recourse against the original receiver of the security.¹(k) The holder of a bill or note indorsed after maturity is subject to all objections or exceptions to which it was exposed in the hands of the indorser.²

124. What is the effect of an agreement not to carry on trade in any part of the country, or in a particular place ?

(1.) An agreement not to carry on trade in any part of the country is void, on the ground of injury to the public, by depriving it of a useful member.

(2.) An agreement not to carry on trade in a particular place is valid, on the principle that a man may sell the goodwill of his business in a certain locality.³(l)

125. May action be sustained for the price of contraband goods sold abroad, or in this country ? State the reason.

(1.) Where the sale has been completed abroad, and the seller

¹ Bell's Prin. 36.

² Bell's Com. i. 322.

³ 19 & 20 Vict. c. 60, § 16.

(i) See Don, 16th June, 1858, 20 D. 1138.

(k) The 8 & 9 Vict. c. 109, § 18, enacts "That all contracts or agreements, whether by parole or in writing, by way of gambling or wagering, shall be null and void ;" but in the 17th section, which repeals the Act of Queen Anne, there is an exception of as much of it as was altered by the 5 & 6 Will. IV. c. 41, referred to in the answer, the effect of which seems to be that bills for gambling debts are not affected by the 8 & 9 Vict., but remain as under the 5 & 6 Will. IV., and that an onerous *bona fide* holder could recover on them. In Foulds, 10th June, 1857, 19 D. 804, it was questioned whether the 8 & 9 Vict. applies to Scotland.

Action does not lie for repetition of gambling debts, when paid, any more than for payment of them ; Paterson, 17th March, 1866, 4 M'P. 602.

(l) So found, Watson, 4th July, 1863, 1 M'P. 1110.

has made delivery on the spot, he can maintain action for the price although he knew the goods were meant to be smuggled into this country ; on the principle, that his interest in the transaction was at an end before the smuggling took place.(*m*) But he will have no action if he is accessory to the smuggling, as by packing the goods in a peculiar way, or otherwise by giving aid in the scheme of evasion, because he thereby commits an infringement of the laws of this country, which he is bound to know so far as concerns his trade.¹

(2.) Where the importer of the goods knows them to be contraband, he cannot maintain action for the price ; the rule in such cases being *melior est conditio possidentis*.²(*n*) But action will be competent to parties through whose hands the goods may subsequently pass, if acting in *bona fide*, and in ignorance that the goods are contraband ; but if the goods are absolutely prohibited, *bona fides* cannot be pleaded.³(*p*)

126. Can the obligations of a person under legal incapacity by attainder be enforced against him ? State the reason.

Yes ; because attainder being designed not as a benefit but as a punishment to the person attainted, it cannot be pleaded by him as a ground to be released from his engagements.⁴

127. Is it lawful to stipulate for any rate of interest in all cases ?

In consequence of the repeal of the Usury Laws by 17 & 18

¹ Bell's Prin. 64 ; Cullen, M. 9554.

² M'Lean, M. 9549.(*o*)

⁴ Serra, M. 10449 ; Ersk. 3, 1, 16.

³ Scougal, M. 9536.

(*m*) See Ersk. 3, 3, 34.

(*n*) The case of Scougal, here referred to, was not an action for the price of the goods, but a suspension of a charge upon a decree for damages for non-delivery, the ground of suspension being, that the purchaser knew at the time of the sale that the goods were prohibited ; which was sustained.

(*o*) See Ersk. 3, 3, 3.

(*p*) In M'Lean (cited) the goods were seized for want of a permit. The pursuer's plea was, "the great embarrassment and prejudice of trade" if the principle were admitted in retail transactions ; which plea was sustained ; but the want of a permit seems to disclose knowledge and exclude *bona fides*.

Vict. c. 90, it is now lawful to stipulate for any rate of interest ; except in the case of heritable securities for cash credits, the principal and interest in which must be restricted to a certain definite sum, not exceeding the principal and three years' interest at five per cent.¹

128. May public offices be sold or adjudged ?

Heritable offices may be sold or adjudged ; but it is otherwise with offices not patrimonial, in which there is a personal trust ; on the principle of *delectus personæ*, and under the English statute of 5 & 6 Edward VI., extended to Scotland, which prohibits the sale of public offices.^(r) Neither can the power of deputation be sold or adjudged, where the office is of the nature of a public trust, or relates to the administration of justice ; on the ground, that the holder of the office, although he has the power of deputation, cannot permit his judgment to be corrupted by the consideration, who will give most for the appointment.²

129. May the salaries of public officers be assigned or attached by legal diligence ?

The salaries of public officers are not assignable or attachable, unless in so far as they exceed a reasonable maintenance, on the ground that the public service requires that its officers shall have a sufficient remuneration in order to keep up the respectability of their station.³ The Bankrupt Act provides that the Lord Ordinary or the Sheriff may order such portion of the pay of any bankrupt government official, whether civil or military, as the chief officer of the department may consent to in writing, to be paid to the trustee towards liquidation of the bankrupt's debts.^{4(s)}

130. What was the effect of a stipulation made by the

¹ 19 & 20 Vict. c. 91, § 7.

² Menzies Lect. 55 (56).

³ Bell's Com. i. 121.

⁴ 19 & 20 Vict. c. 79, § 149.

(r) An agreement whereby the patent office of keeper of a record of sasines was declared to be held in trust for another party than the keeper, declared to be illegal ; Ord, 21st May, 1847, 9 D. 1118.

(s) Held that a pension payable by the Treasury to the clerk of a deceased judge did not fall under this provision ; Latta, 18th July, 1857, 19 D. 1107.

heritors and minister of a parish, with a parochial schoolmaster on his appointment, that he shall hold office during their pleasure?

Such a stipulation with a parochial schoolmaster was null; because he was by law a public officer, and held his office *ad vitam aut culpam*.¹ [A teacher of a public school appointed by the school board after the passing of the Education Act of 1872, holds his office "during the pleasure of the school board." See Morrison, 3 R. 945].

131. What is the effect (1) of an agreement by a minister with the heritors, that he shall not apply for an augmentation of stipend during his incumbency; and (2) of a bond for money given in exchange for a presentation to a church?

(1.) This agreement is null; because it is *pactum illicitum*, controlling the effect of public statutes.²

(2.) The bond is null; being a simoniacal paction, which is *pactum illicitum*.³

132. What is the effect of a deed signed or diligence executed on Sunday?

(1.) A deed signed on Sunday is valid.

(2.) Diligence executed on Sunday is null; with the exception of warrants against persons *in meditatione fugæ*, and criminal warrants which are allowed *ex necessitate*.⁴

133. Whence do the rules as to the purchase by a lawyer of a depending suit, and the *pactum de quota litis*, respectively, derive their force; and what is the penalty in each case?

(1.) The purchase of heritage, while it is the subject of a depending lawsuit, is, by the Act 1594, c. 216, forbidden to any member of the College of Justice, or of any inferior court, directly or indirectly, and the Act has been extended to all matters in

¹ Duff, M. 9576.

² E. of Kellie, M. 15710.

³ Maxwell, M. 9580.

⁴ Menzies Lect. 63 (64).

depending suits.¹ The penalty imposed by the statute is not nullity of the contract, but deprivation of office.²

(2.) *Pactum de quota litis* is a bargain by an advocate or law agent to receive, in remuneration of his professional services, a share of the subject in contest. Such transactions do not fall under the Statute 1594, but are null at common law, on the principle of discouraging rash litigation.³

134. A person having been sued by a solicitor for payment of a business account for conducting a process, in which he was unsuccessful, the former pleaded, in bar of the action, an agreement, whereby the solicitor undertook to conduct the cause at his own expense, for a large pecuniary consideration in the event of success; Is the agreement a sufficient defence to the action?

Yes; because (1) the account having been incurred under the agreement, the solicitor is not entitled to maintain that he was employed on a footing inconsistent with it; and (2) the solicitor having entered into, and acted upon, an illegal contract, is not entitled, for his own benefit, to plead its illegality.⁴

135. A creditor, in a bond and disposition in security, brought the subjects to public sale, and, after a competition, purchased them himself; Was the purchase legal? State the reason.

The purchase was illegal; because a creditor under a bond and disposition in security, in exercising the power of sale, acts not only for his own benefit, but as trustee for the other creditors, where there are any, for the debtor himself, and for all concerned; and no person in the position of a trustee can be *auctor in rem suam*.⁵(t) [See as to the position of a law agent who acted to a

¹ Bell's Illus. i. 48 and 49, and cases there cited.

² Home, M. 9502.

³ Bell's Prin. 36.

⁴ Bolden, 27th Feb. 1850, 12 D. 798.

⁵ Taylor, 20th Jan. 1846, 8 D. 400.

(t) An heritable creditor, who had repeatedly exposed the lands for sale, and ultimately at the sum in the bond, without obtaining a purchaser, applied for appointment of a judicial factor to carry through a sale, in order to allow

certain extent for the sellers, and purchased under another name, but truly for himself, M'Pherson, 5 R. H. of L. 9.]

136. An estate under trust is purchased by A, one of the trustees, who sells it to B; Is B's title objectionable? State the reason.

B's title is not objectionable, if he was not aware that A was a trustee; because a purchase by a trustee is not absolutely null, but only reducible, and the title of third parties, deriving right from the trustee, is not challengeable if they are not cognisant of the objection.¹(u)

¹ Fraser, 13th Jan. 1847, 9 D. 415.(u)

the creditor, if necessary, to become purchaser. Petition refused; Mansfield, &c. (Stirling's Trs.), 1st June, 1865, 3 M'P. 851.

The residuary legatee under a trust-deed held not entitled to bid for the estate at a public sale by the trustees; Faulds, 25th Feb. 1859, 21 D. 587.

(u) The rule here stated may probably be held to be inferred in the judgment of the House of Lords (reversing that of the Court of Session), in *York Buildings Company v. Mackenzie*, 13th May, 1795, M. 13,370, where a purchase of lands by the common agent in a ranking and sale was set aside, but "without prejudice to the titles and interests of the lessees and others who may have contracted with the defender *bona fide* and before the dependence of the present process;" and accordingly, in the case of *Fraser, supra*, Lord Fullerton, after quoting the above reservation, added (9 D. 430)—"Now, suppose Mackenzie had sold part of the estate before the action was raised, I do not see how, under the terms of the remit of the House of Lords, the title of the purchaser could have been challenged." That reservation, however, may have had some reference to the fact that parties had transacted on the faith of the judgment in the Court of Session. The rule against a trustee purchasing the estate is absolute (Faulds, note (t) *supra*). While his title forms part of the prescriptive progress the fact could hardly fail to appear, both from it and the record, and it did so appear in *Fraser*; but the ground of judgment there was a series of acts, some of them judicial, showing acquiescence in and confirmation of the sale by the bankrupt; *mora* (thirty-nine years) in bringing the challenge, and want of title in the pursuer (the heir of the bankrupt proprietor), the interest being held to be in the creditors alone. See as to the effect of fraud in sale, *Stewart, H. of L.*, 14th March, 1754, 1 Pat. App. 578; and 20th Dec. 1757, 6 Pat. 711, where an entailed estate having been sold for payment of debt, under an Act of Parliament, applied for and obtained with the concurrence of the appellant and other substitute heirs of entail, it was held that the appellant was not barred by such concurrence, nor by the Act, from opening up the whole proceedings, and showing that the debts represented as due were fictitious, and not chargeable against the estate; and the sale was set aside.

137. May a contract for furnishings entered into between a public company and one of its directors, be enforced against the company, there being no question as to the fairness of the transaction? State the principle.

The contract cannot be enforced against the company; on the principle that the duties of a director are of a fiduciary nature; that a trustee cannot enter into contracts in which he has a personal interest, conflicting or which may conflict with those of his constituents; and that the principle is so strict that no investigation can be allowed into the fairness or unfairness of the transaction.¹

138. Is a law agent, acting as a trustee under a settlement, entitled to make professional charges against the trust?

(1) The general rule is, that a law agent acting as a trustee under a settlement is not entitled to make professional charges; on the principle, that a trustee cannot make profit in the management of the affairs committed to him;² [A sole trustee is also not entitled to charge for professional work for the trust; Aitken, 9 M.P. 756.] (2) but he will be entitled to charge where he acts with the consent of the beneficiaries, if *sui juris*, and on the understanding on their part that he was to receive remuneration;³ (3) or where the trust-deed authorises the trustees to appoint one of their number factor and law agent of the trust, with a suitable remuneration;⁴ (4) or where the trustees are merely empowered "to appoint agents and factors either of their own number or other fit persons," on the principle that the authority to appoint a trustee to hold the offices of agent and factor implies an intention on the part of the truster that the trustee appointed to these offices

¹ Aberdeen Ry. Co., 20th July, 1854, 17 D. 20, and 1 Macq. App. 461.(v)

² Ommanney, 3rd March, 1854, 16 D. 721.

⁴ Fegan, 20th July, 1855, 17 D.

³ Lord Gray, 12th Nov. 1856, 19 D. 1.(x)

1146.

(v) Where Commissioners of Police made a contract with one of their own number for furnishings, a competing offerer found entitled to damages; Haining, 16th March, 1861, 23 D. 755.

(x) Decided, 21st June, 1856.

should receive remuneration, which is not inconsistent with public policy.¹

VI. EFFECT OF ERROR, FORCE, OR FRAUD ON DEEDS.

139. Distinguish degrees of error, and their respective effects upon contracts.

Error in substantials, regarding either the person contracted with, or the subject-matter, annuls the contract, where reliance is placed on what has been mistaken, "for those who err cannot be said to agree;" but if the error is only in the accidental qualities of the subject, the contract is valid.²

140. Is an obligation to pay binding which has been granted under error in fact or in law; and if such an obligation has been implemented by payment, may restitution be demanded?

(1.) An obligation to pay granted under error, either in fact or in law, will in general not be binding; because an obligation to pay must be founded on previous liability.³

(2.) Where the money has been paid under error in *fact*, there will be restitution, if the error has been excusable; but it will be otherwise if the party has the means of knowledge within his power, and did not use those means. A payment made under error in *law* affords no ground for restitution.⁴ [See observations on error in law, Mercer, 9 M'P. 618; Kippen, 1 R. 1171.]

141. A trustee for creditors agreed with the holder of an heritable security to make him a payment out of the trust funds, on his engaging to abstain from selling the subject. After the money had been paid, the security was found to be bad; was the trustee entitled to repetition of the sum paid? State the reasons.

No; because (1) the transaction was a compromise; and (2)

¹ Goodsir, 19th June, 1858, 20 D. 1141.

² Ersk. 3, 1, 16; Bell's Prin. 11.

³ Bell's Prin. 11.

⁴ Wilson, 7th Dec. 1830, 4 W. & S. 398: reversing judgment 12th Feb. 1829, 7 S. 401.

although error in law invalidates a contract, it does not entitle to restitution after the money has been paid.¹

142. What is the effect of fraud on contracts ?

Where the fraud gives rise or leads to the contract—*ubi dolus dedit causam contractui*—it is reducible, as the party has not contracted, but been deceived. Where the fraud is only incident to or an accompaniment of the contract, it is binding, the party imposed upon having relief only by way of a claim for damages.²

143. What is the general characteristic of force or fear sufficient to void a contract ?

Force or fear sufficient to void a contract must be such as would overpower a man of firmness and resolution ; or such as, applied to a person of weaker age, sex, (y) or condition, would have the same effect as overpowering fear on a mind of ordinary firmness.³

144. A creditor, *metu carceris*, obtained a bond of corroboration from his debtor for the amount contained in the diligence, upon which he was imprisoned, and also for a separate debt. Is the bond reducible ?

The bond is not reducible *quoad* the sum contained in the diligence upon which the debtor was imprisoned ; because reduction is not competent upon fear, which proceeds from the regular execution of lawful diligence, for legal execution can import no wrong. But the bond is reducible *quoad* the separate debt ; because the obtaining of deeds from an imprisoned debtor by the incarcerating creditor which have no relation to the debt contained in the diligence, is beyond the lawful object of imprisonment, and such deeds are therefore reducible *ex metu*.⁴

¹ Grieve, 25th Jan. 1828, 6 S. 454 ; aff. 19th August, 1833, 6 W. & S. 543.

² Ersk. 3, 1, 16 ; Bell's Prin. 13.

³ Ersk. 4, 1, 26 ; Bell's Prin. 12.

⁴ Ersk. 4, 1, 26.

(y) Averments that a deed had been obtained from a woman by threats of the immediate incarceration of her husband for civil debt, held not relevant to entitle her to an issue of force and fear ; Craig, 13th Dec. 1865, 4 M'P. 192.

145. A debtor, while in prison for the amount of a bill, was induced by the incarcerating creditors to grant in their favour an absolute disposition to a house ; Is the disposition valid to any effect ?

The disposition is reducible ; “in respect the deed was taken from the pursuer (the debtor) while he was in prison at the defender’s instance, and was not a bond of corroboration, or in any shape relative to the debt for which he was incarcerated, but an absolute disposition of a separate subject.” But it is effectual “as a security to the defenders for any debt they can instruct to be justly due to them.”¹

146. What is the effect of deeds obtained by fraud, or by force or fear, in the hands of third parties ?

(1.) Deeds obtained by fraud are not challengeable in the hands of third parties purchasing *bona fide*, unless they represent the defrauder ; because such deeds are not absolutely null, there being consent, though the granter’s judgment had been influenced by fraud in giving it. Thus, purchasers of feudal rights, relying on the faith of the records,—purchasers of corporeal moveables, who give their money for the subject itself, trusting nothing to personal credit,—and onerous indorsees of bills and notes before the date of payment, and of bills of lading,—are not affected by the fraud of their authors if they themselves have not been *participes fraudis*. But where the assignee represents or stands in the place of the person who fraudulently impetrated the right, the rule obtains, *Assignatus utitur jure auctoris*, so that all exceptions which were competent against the cedent are good against the assignee, as is the case in bonds or other personal obligations or contracts ; [see in confirmation, Lord President Inglis, in Scottish Widows’ Fund, 3 R. 1078] ; and also by statute, in indorsations of bills and notes after the date of payment, which are deemed to have been taken subject to all objections or exceptions to which they were liable in the hands of the indorser.

(2.) A deed extorted by force or fear is null not only to the grantee but in the hands of third parties, whether with or without notice ; because the objection produces a *labes realis*, or inherent

¹ Fraser, 13th Dec. 1810, F.C.

vitiation, there being an absolute defect of that consent which is essential to every obligation.¹

147. What is necessary to found a reduction of a deed under the Act 1621, c. 18, anent unlawful dispositions by bankrupts?

(1.) The deed must be granted after contracting the debt due to the pursuer.

(2.) It must be granted in favour of a conjunct and confident person.

(3.) It must be without true, just, or necessary cause to the prejudice of the granter's creditors. [See Watson, 1 R. 882, where averments held not sufficient to support a reduction under Statute 1621.]

(4.) The granter must be insolvent at the date of delivery of the deed.²

148. May gratuitous creditors challenge, under the Act, deeds granted by the bankrupt to their prejudice? State the principle.

Yes; because donation infers a just, true, and lawful obligation against the donor, and carries an implied warrandice against future deeds.³

149. Are a brother, an uncle by blood or affinity, and a cousin by blood or affinity, conjunct persons, in the sense of the Act?

A brother and uncle by blood are conjunct persons (z) in the sense of the Act, but not an uncle by affinity, (a) or a cousin whether by blood or affinity.⁴(b)

150. Are cautionary obligations struck at by the Act 1621?

No; because a cautionary obligation is not considered gratui-

¹ Bell's Com. i. 315; Ersk. 3, 5, 10; 19 & 20 Vict. c. 60, § 16; Wardlaw, 10th June, 1859, 21 D. 940.

² Ersk. 4, 1, 28 *et seq.*

³ Ersk. *ib.*

⁴ Ersk. 4, 1, 31.

(z) Tarpersie, M. 900.

(a) Elibank, M. 12569.

(b) Mercer, M. 12569.

tous. It is onerous so far as the creditor is concerned, who, in consideration of the security, lends his money, and forbears from diligence.

151. What deeds are struck at by the Act 1696, c. 5, for declaring notour bankrupts?

All deeds granted by a bankrupt within sixty days of bankruptcy towards the payment or for the further security of any creditor, in preference to the other creditors. But the Act does not strike at alienations in consideration of a price paid in cash; nor at *nova debita* or obligations for sums instantly received;¹ nor at deeds granted in implement of a prior obligation, but the obligation must be *instantly* to grant,² and not at any time *when required*.³

152. Are bills, or a bond of corroboration of a prior debt executed by the granter to save him from diligence, struck at by the Act 1696, if granted within sixty days of bankruptcy?

(1.) Bills granted for present advances do not fall under the statute;⁴ but acceptances and indorsations of bills in security of prior debts,⁵ and payments by means of bills drawn on debtors of the bankrupt,⁶ are challengeable.

(2.) Bonds of corroboration, being voluntary deeds, are struck at by the Act.⁷

[153. A & Co. were holders of a bill for £100, drawn by B on C, and accepted by the latter. A & Co. also held three acceptances by B. A & Co. agreed to renew the £100 bill if C guaranteed B's three acceptances. B and C were sequestrated within sixty days. Was the trustee on C's estate entitled to reject A & Co.'s claim on the guarantee as struck at by the Act 1696?

¹ Ersk. 4, 1, 41.

² Cranstoun, 2nd Feb. 1830, 8 S. 425; aff. 6th July, 1832, 6 W. & S. 79; Taylor, 8th March, 1855, 17 D. 639.

³ Moncrieff, 16th Dec. 1851, 14 D. 200.(c)

⁴ Stein, M. 1142; Dundas, 2nd June, 1808, F.C.

⁵ Robertson, 21st Nov. 1798, F.C.

⁶ Barbour, 30th May, 1823, 2 S. 351.

⁷ Mackellar, M. 1114.

(c) See also Mansfield, 28th June, 1833, 11 S. 813.

No ; because it was not an obligation by C in favour of one of his own creditors, but in favour of a creditor of B ; Ferguson, 7 M'P. 592.]

[154. By the contract for making a railway, it was provided that plant brought by the contractor and left upon the ground (which belonged to the company), should be held to be the property of the company. Within sixty days of the contractor's bankruptcy, the works not being completed, he, with consent of the company, assigned the contract and plant to his cautioner. Was this transaction reducible by the contractor's trustee under the Act 1696 ?

No ; because the railway company had a real and preferable right of pledge in the plant, and could assign that right so as to put the cautioner in their room ; Moore, 7 M'P. 1016.]

155. What circumstances infer notour bankruptcy ?

(1.) Sequestration, or by the issuing of an adjudication of bankruptcy in England or Ireland.

(2.) Insolvency concurring either—(1) with a charge for payment, followed by imprisonment or apprehension of debtor, or by his flight or absconding from diligence, or retreat to the sanctuary, or forcible defending of his person against diligence, or where imprisonment is incompetent or impossible, by arrestment unloosed for fifteen days, or by poinding, or by adjudication ; or (2) with sale under a poinding, or under a sequestration for rent, or with his retiring to the sanctuary for twenty-four hours, or with his applying for a *cessio bonorum*.¹ [By the Debtors' (Scotland) Act, 1880 (43 & 44 Vict. c. 34, § 6), it is enacted that "in any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency, concurring with a duly executed charge for payment, followed by the expiry of the days of charge without payment, or where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment, followed by the lapse of the days intervening prior to execution, without payment having been made."]

¹ 19 & 20 Vict. c. 79, § 7.

VII. HOMOLOGATION AND REI INTERVENTUS.

156. Define homologation and *rei interventus*, so as to show their difference.

(1.) Homologation is the assent or approval which the *granter* of a deed interpones to it by a posterior act, so as to exclude objections, which otherwise would have been competent to him, and admitted by law for his own protection, but waived by the approbatory act.¹

(2.) *Rei interventus* excludes the privilege of resiling from contracts which, although really undertaken by the parties, are not binding in respect of defect in form or in authentication; and it "is grounded on the fact of the person, otherwise imperfectly bound, having permitted *the other party* to proceed on his obligation or agreement as if it were complete; and to perform acts on the faith of it, referable to or resulting from the agreement, and which, by the refusal to execute the agreement, would prove detrimental to the person so misled or encouraged to proceed."²

157. May deeds granted by pupils, or by minors, without consent of their curators, or by wives without consent of their husbands, be rendered obligatory by homologation?

(1.) Deeds by pupils do not, in a strict sense, admit of homologation; because pupils are naturally incapable of consent, and the doctrine of homologation does not apply to deeds by parties labouring under an absolute natural incapacity.³(d) Approbatory

¹ Bell's Prin. 27; Menzies Lect. 176 (182).

² Ersk. 3, 3, 47; Menzies Lect. 177 (183).

³ Bell's Com. i. 345.

(d) Erskine, in his Principles (3, 3, 15), says that homologation "takes place even in deeds intrinsically null, whether the nullity arises from the want of statutory solemnities or from the incapacity of the granter;" and this is referred to as more accurate by Mr. Bell (i. 145, note). And Mr. Dickson (Evid. § 856) also doubts the soundness of the distinction taken by Erskine, in his Institutes, between a deed by a minor as being capable of homologation, and one by a pupil as being a kind of *non ens*. But the difference may lie in this, that while there is a certain capacity of consent on the part of a minor, there is

acts, however, by the granter may render the deed obligatory upon him, on the principle of adoption ; but this is truly making a new deed, the binding effect of which can have no retrospect.¹

(2.) Deeds by minors, without consent of their curators, and by wives without consent of their husbands, may be rendered effectual by subsequent homologation ; because the nullity of such deeds arises from legal disqualification, and not because the parties are naturally incapable of consent.^{2(e)}

158. Does the subscription of the instrumentary witnesses infer their homologation of the deed ? State the principle.

The subscription of the instrumentary witnesses to a deed does not infer homologation ; because they merely attest the granter's signature, and are not presumed to know the contents of the deed, without a knowledge of which there can be no homologation. But it has been held that the subscription of a father as witness to his daughter's marriage-contract infers homologation, there being a presumption, arising from the attestor's near relation to

¹ Bell's Com. i. 140.

² Ersk. 8, 3, 47.

absolutely none on that of a pupil ; that there can be no approbatory acts by him till his incapacity has ceased ; that even then they have no retrospective effect, because there is no deed to which they can refer, and therefore that they constitute, not homologation proper, but adoption, or a new and independent deed.

(e) Erskine, in the section here referred to *ad fin.*, says :—" Where the act of homologation is itself invalid, the defects of the original deed cannot thereby be supplied. A woman, for instance, while she is clothed with a husband, is incapable of homologating an informal or defective deed which she had granted previously to her marriage, because the consent given by her in the act of homologation is as invalid and ineffectual as it was in the deed homologated." It has been held that a bond granted by a female minor, with consent of her father, was not homologated by a subsequent recognition contained in an antenuptial contract of marriage between her, while still in minority, and her intended husband ; Rose, 20th Nov. 1821, 1 S. 154. But the case was somewhat special, the bond, which was by a sister to a brother, being objected to on the ground of lesion, which was sustained ; but action was reserved to the pursuer for any claim which he could competently establish. The Lord Ordinary (Alloway), in a note, observed as to the husband, that " At the time he entered into the contract of marriage it might be doubted whether he had any title to challenge the bond."

the bride, that he both knew and approved the contents of the deed.¹(*f*)

159. Does the subscription of an heir-at-law to his father's settlement, executed on deathbed, infer homologation?

No; because (1) instrumentary witnesses merely attest the grantor's signature; and (2) it is presumed that he signed as witness from fear of offending his father by refusal.²(*g*) Homologation has been inferred where the heir had both written and attested the deed;³ but as a ratification of a deathbed deed, or a renunciation of the right of challenge by the heir during the life of the grantor, is of no avail,⁴ the case cited *infra*⁵ is of questionable authority.

160. A bond granted by a female under age, without consent of her curators, is ratified by her after her marriage, with the concurrence of her husband; Is the bond effectual against either the husband or the wife?

The bond is not effectual against the wife, because one who is incapable of legal obligation cannot homologate;⁶ nor against the husband, because a husband's concurrence in a personal obligation by his wife neither makes the obligation valid, nor creates an obligation on himself.⁶(*h*)

¹ Ersk. 3, 3, 48; Davidson, M. 5652; Johnston, M. 5657.

² Dallas, M. 5677.

³ Brown, M. 5624.

⁴ Inglis, M. 3327; Forbes, M. 3277.

⁵ Ersk. 3, 3, 47.

⁶ Lennox, 19th May, 1821, 1 S. 22.

(*f*) Erskine, in the passage cited, attributes a similar effect to witnessing by a brother.

(*g*) Erskine (3, 8, 99) lays down this rule, but Professor Bell (l. 139, note) says, commenting on the passage, "It would rather seem that if the ancestor *could* effectually disinherit, and is prevented from doing so only by the heir's consent, it would be an act which the heir could not afterwards be entitled to retract. This fear of disinheriting is not the species of fear which the law regards as sufficient to annul consent."

(*h*) The case of Lennox, cited, referred not to a bond granted by an unmarried female under age, but to a cautionary obligation granted by a wife for her son by a former marriage, to which the husband subjoined, "The above is done with my consent;" and which was found null *in toto*, the ground in regard to the husband being, that as a mere consenter he undertook no obligation. Perhaps the case intended to be referred to was that of Rose, quoted in note to Ans. 157, though the circumstances are not quite the same. It is to be kept

161. Is a deed of entail vitiated by erasures *in substantialibus* capable of homologation? State the reason.

No; because if the estate was not validly fettered by the entail, as executed and completed by the maker, his heirs are entitled to take up the estate in fee simple, and their acts cannot raise a null deed into a strict entail.¹

162. Does the receipt of rents by an heir of entail, who is also heir *alioqui successurus*, infer homologation of a lease granted by his ancestor contrary to the terms of the entail? State the reason.

No; because the acceptance of rents payable under a deed, which affords a good title of possession till reduced, does not infer homologation of the deed.²(*k*)

163. May a deed be homologated in part?

Yes; but protestation must be made restricting the effect of the approbatory act; otherwise it will sanction the whole deed, unless fairly divisible into parts.³ But where the person protesting is not entitled to take the benefit which he contemplates without undertaking the obligations imposed by the deed, the protest will have no effect in discharging such obligations.⁴(*l*)

¹ Dickson Evid. i. 444 (§ 858);
Shepherd, 24th Jan. 1844, 6 D.
464.(i)

² Malcolm, 19th June, 1823, 2 S. 410.

³ Menzies Lect. 179 (185).

⁴ Shaw on Oblig. 202.

in view that bonds by minors, without consent of their curators, are not necessarily null (see 87), and therefore a husband might be liable for such a bond, without any ratification. As to a husband's liability for his wife's acts, see Grant, 26th Feb. 1830, 8 S. 606, where a husband, being sued for money borrowed by his wife, part of which he had repaid, though alleging that it was a secret transaction from which he reaped no benefit, pleaded that his wife could not contract obligations for borrowed money, so as to bind him; but the claim was found to have been sufficiently homologated by the defender.

(i) Aff. 6 Bell's App. 153. The question here was as to the efficacy of the destination. See also Boswell, 20th Jan. 1852, 14 D. 378.

(*k*) In the case of Malcolm, quoted, there was the specialty that the right to challenge was expressly reserved in all the receipts, so that the case is hardly in point, and the fact of the pursuer being heir *alioqui successurus* does not appear in the report.

(*l*) This is on the principle of approbate and reprobate. Homologation is not excluded by a reservation not communicated; Adam, 24th Dec. 1842, 5 D. 391.

164. In the reduction of a deed on the ground of insanity, or of facility and lesion, is the defender entitled to a counter-issue of homologation? State the reason.

(1) The defender will not be allowed a counter-issue of homologation as against the issue of insanity; because the proof to be led by the pursuer, if satisfactory to the jury, would absolutely destroy the deed, and there would be nothing left to be set up by homologation. (2) But the defender is entitled to meet the issue of facility and lesion by homologation; because, although the pursuer proved that the deed had been impetrated, yet if the defender established that it had been subsequently and sufficiently homologated, the deed would stand.¹

165. Does homologation validate deeds from their date?

(1) Where there is already an obligation existing, though imperfect or subject to exception, homologation has the effect of confirming it from its date, the deed having then received the essential element of consent. (2) But where the deed is originally null, the binding effect of homologation has no retrospect, the consent in this case being adhibited when the party, by the approbatory act, for the first time undertook the obligation.²(m)

166. What is the difference in effect betwixt a promise to convey land and a promise to ratify an informal deed?

A promise to convey land may be resiled from before it is reduced to writing; but it is different with a promise to ratify an informal deed already granted, as in this case the action lies on

¹ Gall, 3rd July, 1855, 17 D. 1027.

² Bell's Com. i. 140; Dickson Evid. i. 450 (§ 870).

(m) This is properly adoption.

Professor Bell states (Com. i. 141) that where there is a verbal error in the deed homologated, the homologation will be held to sanction the deed in its true meaning, but not the error; and that though homologation bars him who so confirms the deed and his representatives, it does not affect third parties entitled to rely on a real right, and so homologation of an heritable bond, in which one of the witnesses was not designed, and on which infeftment followed, was held ineffectual to support it as a real right in competition, although good to support the bond as a personal debt; Liddell, M. 5721. See also Mansfield, 28th June, 1833, 11 S. 813.

the deed, and the granter is barred by his promise, *personali exceptione*, from pleading the nullity.¹(n)

167. May a deed be validated by *rei interventus* when the subscription is denied? State the reason.

No; because the object of *rei interventus* is to obviate defects in the form or the authentication of documents, to which the party has really, though not formally, consented.²

168. May a deed to which a party's signature has been forged be validated by homologation or *rei interventus*?

A forged deed may be rendered binding by homologation; in consequence of the party whose signature is fabricated either expressly or by his conduct accrediting the deed as genuine.³(o) [Mere silence will not necessarily imply homologation; Mackenzie, 18 S.L.R., H. of L., 366.] But a forged deed cannot be made effectual *rei interventu* by the *other party* having acted on the faith of it; because that plea is available only where real consent is admitted or proved.⁴

169. May a deed granted by a minor, without consent of his curators, be made binding on him by homologation or *rei interventus*?

A deed by a minor, without consent of his curators, may be validated by homologation after majority; the want of the curators' consent being an objection admitted for the minor's protection, which may be waived by him when *sui juris*. But such a deed will not be made effectual by *rei interventus* done on the faith of the deed by the other party, at least during the minority of the granter, on the principle stated in Answers Nos. 167 and 168.⁴(p)

¹ Christies, 19th November, 1776; Bell's Illus. i. 35.

² Dickson's Evid. i. 444 (§ 857), and cases there cited.

³ Graham, 30th Nov. 1848, 11 D. 173.

⁴ *Ib.* i. 424 (§ 817).

(n) In the case (Christies) cited, which is dated 22nd Feb. 1745, and is reported, M. 8437, it was found relevant to prove a promise to ratify an informal disposition by the oath of the party.

(o) Mr. Dickson (§ 857) says such a deed may be so rendered binding, "at least in the hands of one who is not accessory to the fraud."

(p) Homologation also validates deeds impetrated by fraud, and operates *ab initio*, Dickson's Evid. § 857, and note 1.

170. May a verbal lease for a period of years be validated by *rei interventus*?

(1) A verbal lease for a period of years may be validated as against the *landlord and his heirs*, by *rei interventus*, provided such *rei interventus* can be fairly ascribed to a right of longer duration than a single year ;(*r*) but where it applies only to a right of possession from year to year it will not make a lease for a period of years effectual.¹ (2) But a verbal lease, though followed by *rei interventus*, is not binding upon the landlord's *singular successors*; who may disregard any tack which has not been reduced to writing, and followed by possession.²

171. When a person has agreed verbally to become cautioner, and promised to sign a written obligation, does *rei interventus* on the verbal undertaking render it effectual?

No; because writing is a statutory requisite in the constitution of cautionary obligations.³

VIII. STAMPS.

[The Stamp Act, 1870, is now the leading statute.]

172. Enumerate the different kinds of stamps.

(1) *Ad valorem* stamps; (2) deed stamps; (3) denominational

¹ Ersk. 2, 6, 21; Ivory's Note, 96; 2, 6, 24 and 25; Dickson's Evid. i. Bell's Prin. 1189. 431 (§ 833).

² 1449, c. 18; Stair, 2, 9, 4; Ersk. ³ 19 & 20 Vict. c. 60, § 6.

(*r*) Such as paying a grassum, erecting expensive buildings, &c. It is to be kept in view that, notwithstanding *rei interventus*, a verbal lease can be proved only by writ or oath of party, and not by witnesses. "When the institutional writers or other authorities speak of a verbal agreement not being binding, even if it were admitted upon oath, they always mean a verbal agreement upon which there has been no *rei interventus*. And, on the other hand, when they speak in other passages of a verbal agreement being binding if *rei interventus* has followed upon it, they always mean a verbal agreement competently proved; that is to say, proved by the adversary's oath;" *per* Lord Deas in Gowans, 18th July, 1862, 24 D. 1382, who also said, in reference to a contention by the defender, that there was no averment of a written agreement—"I am not disposed, however, to hold the pursuers precluded on this ground from establishing a written agreement, if they can do so."

stamps ; (4) stamps for progressive duty on words ; (5) drafts, or orders payable on demand, and receipts.

[Stamps for progressive duty on words were abolished by the Stamp Act, 1870.]

173. When a stamp is used of an improper denomination, but of equal or greater value than the proper stamp, is the instrument validly stamped ?

The instrument is validly stamped, unless the stamp used shall have been specially appropriated *ex facie* to another instrument(s) as stamps for bills or notes.¹ But adhesive receipt-stamps(u) may be used for drafts or orders, notwithstanding their special appropriation.² [See 1870 Act, § 9.]

174. Does a receipt by a factor to his constituent, for money to be applied as directed by the latter, require a stamp ? State the reason.

No ; because a writing attesting the fact of the passing of money from one hand to another, when it is not paid in the discharge of an antecedent obligation, is not a receipt in the sense of the Stamp Acts.³ [See, however, 1870 Act, § 120. Such a writing would seem now to require a stamp.]

175. What is the proper stamp for a bond with a conveyance of lands, and a policy of assurance in security ?

¹ 16 & 17 Vict. c. 59, § 10.(t)

² Macintosh, 16th Dec. 1851, 14

³ 17 & 18 Vict. c. 83, § 10.

D. 187 ; Menzies Lect. 85 (88).

(s) There is an exception to this rule in the case of bills and promissory-notes, which must be impressed with appropriate stamps (Tilsley, 132) ; but if "stamped with a stamp of an improper denomination, but of sufficient amount, may be stamped on payment of the duty and a penalty" of 40s., or £10, according to circumstances ; 37 Geo. III. c. 136, §§ 5 and 6. In no other case can bills or notes be stamped after they are written.

(t) The provision is contained not in this Act, but in 55 Geo. III. c. 84, § 10.

(u) The provision of the Act applies to adhesive stamps for receipts and for orders or drafts of money payable to the bearer on demand, which may "be used for the purpose of denoting the like amount of duty, either on a receipt or on such draft or order as aforesaid, without regard to the special appropriation thereof for the other of such instruments, by having the name on the face thereof."

A mortgage-stamp for the principal sum, the deed containing only one transaction.

176. What is the proper stamp for a conveyance of lands, only part of the price being paid, and a bond regularly stamped being given for the balance?

A conveyance-stamp for the full amount of the price.

177. What is the proper stamp for a disposition where part of the price is made a real burden on the conveyance, but the grantee is not personally bound?

A conveyance-stamp for the full price, and a mortgage-stamp for the real burden.(x)

178. What is the proper stamp for a conveyance under burden of an annuity reserved to the grantor and his wife?

A conveyance-stamp, with a stamp appropriate to a grant of the annuity.¹

179. Do receipts for sums paid into a person's bank account require to be stamped?

A stamp is unnecessary where the receipt is granted to the depositor himself; but it is required in the case of a receipt granted to a third party for money paid in by him to the account of another; because such a receipt operates as a discharge to the grantee. [See Stamp Act, 1870, § 120, and remarks thereon in Fisher's Notes, p. 127.]

180. What is the rule for calculating the stamp-duty on leases, where a grassum is paid?

Lease-duty on the rent [Stamp Act, 1870], and conveyance-duty on grassum.

¹ Wilkie, 5th March, 1850, 12 D. 818.

(x) If the part of the price has been made a real burden by a prior mortgage, which it is arranged is to be allowed to remain, the conveyance-stamp alone is sufficient.

181. May an unstamped or improperly stamped disposition, promissory-note, policy of sea insurance, and a receipt, be stamped after delivery?

(1.) A disposition may be stamped after delivery, on payment of the duty only, if brought to the Solicitor's Office, Inland Revenue, *within sixty days* of the first date, or, in certain circumstances, within sixty days of the last date. The deed may be stamped *within twelve months*, without payment of penalty, or on payment only of a portion thereof, provided it shall be proved that the deed was not duly stamped before execution by reason of accident or urgent necessity. *Beyond twelve months*, it may be stamped on payment of a penalty of £10. If the deed shall be executed *abroad*, it may be stamped without any penalty if brought to be stamped within *two months* from the time of its being received in the kingdom. [1870 Act, § 15.]

(2.) An unstamped or inadequately stamped promissory-note cannot be afterwards stamped. [Bills of exchange and promissory-notes, purporting to be drawn or made out of the United Kingdom, must, before negotiation in the United Kingdom, be stamped with adhesive stamps.] When a stamp of a wrong denomination, but of the proper value, has been used, the mistake may be remedied on payment of a penalty. [Act, §§ 52 and 53.]

(3.) A policy of sea insurance cannot afterwards be stamped, except in cases of additional stamps for policies of mutual insurance, which were not underwritten for a sum beyond what the original stamp would carry. [By the Customs and Inland Revenue Act, 1881, the time allowed for stamping policies of sea insurance made or executed out of the United Kingdom has been reduced from two months to fourteen days from the date of receipt in the United Kingdom, § 44.]

(4.) A receipt may be stamped within a fortnight, on payment of a penalty of £5 ; and within a month, on payment of £10 ; but after that period it cannot be stamped. [1870 Act, § 122.] A receipt indorsed upon a bond, mortgage, or bill duly stamped, is exempt from stamp duty. [1870 Act, § 120, sub-sec. 11.]

[182. May (1) a bill of lading, and (2) a charter-party be stamped after execution?

(1) A bill of lading cannot be stamped after execution, Stamp

Act, 1870, § 56. (2) A charter-party may be stamped within a month of the first execution on payment of certain penalties ; further, when a charter-party has been first executed out of the United Kingdom it is held duly stamped if an adhesive stamp is affixed thereto within ten days after its arrival in this country, and before signature by any person in the United Kingdom. Stamp Act, 1870, §§ 67, 68.]

183. Three acknowledgments for money are granted on unstamped paper, the first bearing "which I oblige myself to repay ;" the second, "for which I shall account ;" and the third, "which I shall pay you when called for ;" do these documents require to be stamped ; and if so, are they stampable after delivery ?

The first and second documents are obligations requiring a bond-stamp, and therefore stampable.¹ But the third is a promissory-note, and, therefore, incapable of being stamped.²(e) [See cases where two documents were held to be promissory notes ; Vallance, 6 R. 1099 ; Blyth, 6 R. 1102.]

184. What is the effect of an unstamped bill of sale of a ship, and a letter acknowledging receipt of the price ?

¹ Jones, 4th Dec. 1834, 13 S. 117. ² Milne, 10th June, 1852, 14 D. Pirie's Rep., 28th Feb. 1833, 11 S. 849.
473.

(e) Questions of this kind are always nice, and it is often difficult to draw the line between what does and what does not constitute a promissory-note. As observed by Lord President Hope in Jones (cited)—"A variation, though apparently very minute, in the wording of such an instrument as this may make an important change in its legal character. It is therefore very difficult to find one case which can be truly regarded as a precedent accurately in point to another, unless the instrument founded on was expressed in the same terms in both cases." The test of a promissory-note may be stated generally to be that the instrument shall contain a promise to pay a certain sum of money to the payee on demand, or at a particular date, or at a definite period, ascertained or ascertainable from the document itself ; Pirie's Reps. (cited) ; Braid, 3rd March, 1858, 20 D. 728, where, in the Lord Ordinary's note, the cases are collected ; Macfarlane, 11th June, 1864, 2 M'P. 1210 ; Martin, 25th June, 1833, 11 S. 782 ; Haddin, 17th Jan. 1838, 16 S. 331 ; M'Cubbin, 9th July, 1856, 18 D. 1224. Words inappropriate to such instruments, or the adjection of something beyond the promise to pay the sum, may affect the character of the instrument, and convert into an agreement or bond what would otherwise be a promissory-note ; Morgan, 20th Jan. 1866, 4 M'P. 321 ; Macfarlane, *supra*.

Bills of sale of ships are exempt from stamp-duty : but a letter acknowledging receipt of the price does not fall within the exemption. It is a receipt for money, and therefore, if unstamped, it is not legal evidence of payment.¹(f)

185. Is one stamp sufficient for a bond by three persons to pay debts due to several creditors of a common debtor against whom diligence had been used ?

One stamp is sufficient, if the obligation by the granters is joint and several ;(g) the rule being, that where the subject-matter of the deed is truly single, only one stamp is necessary, although there may be several persons interested in the deed.² [1870 Act, § 8.]

186. Who is liable for the expense of after-stamping a bond, or a gratuitous assignation forming a pursuer's title ; or a mutual contract founded on by both parties ?

(1.) The granter of a bond is liable for the expense of after-stamping, on the ground that he ought to have implemented it without an action, and to have given a valid obligation at first.³(h)

¹ Davidson, 21st June, 1854, 16 D. 991.

³ Gardiner's Exec., 28th Nov. 1839, 2 D. 155.

² Johnston, 1801, M., Writ. App. No. v.

(f) In the case referred to, the judges indicated an opinion to the effect here stated ; but it was not necessary to decide the point, and it was not actually decided.

(g) The absence of the joint and several element would not make any difference on this rule. The ground of the judgment in Johnston (cited) was, that "There was here no junction of matters naturally disconnected with each other for the purpose of evading the stamp-duties, which is what the law had in view to prevent." It has been held in England that an indemnity for a debt undertaken by several persons, each respectively to a limited amount, was "one transaction, requiring only one stamp ;" Ramsbottom, 4 M. & W. 584 ; 7 Dowl. 173 ; H. & H. 464. By the 55 Geo. III. c. 184, where property bought separately of different persons at separate and distinct prices shall be conveyed to the purchaser by one and the same deed, such deed is chargeable with the *ad valorem* duty on the aggregate amount of the purchase moneys.

(h) The document in question in the case of Gardiner's Executors was a letter, granted for the liberation of a debtor in custody under caption. In the case of Macpherson, 7 D. 358, where it was pleaded that a "party should be found liable, as it was his own deed that he had objected to, and he had agreed to stamp it if required," it was observed *per* Lord Justice-Clerk (Hope) — "There has been great variety in the decisions. In such a case as the present

But where the granter was bankrupt, it has been held that the expense falls on the grantee.¹

(2.) In the case of a gratuitous assignation forming a pursuer's title, the expense of stamping will fall on him, as he is bound to put himself *in titulo* to use it.²

(3.) In the case of a mutual contract, the expense will fall on both parties equally.³ [See in confirmation M'Douall, 8 M.P. 1012.]

187. May the objection, that a document is unstamped, be stated in an action raised upon it after the case has been carried to the Inner House, on a closed record, or in a suspension of a charge on the decree pronounced in the action?

The objection, that the document is unstamped, may be stated in the Inner House, or at any stage of the cause, although there is no plea on record to raise it; because it is *pars judicis* to enforce the revenue laws.⁴ But it cannot be raised in a suspension after the cause is out of Court, and the document has been followed by a final decree without the objection having been taken.⁵

188. May an unstamped document be used judicially in any cases?

¹ Law, 20th July, 1849, 11 D. 1489.

⁴ Home, 7th June, 1836, 14 S. 898.

² Macpherson, 7th Feb. 1855, 17 D. 358.

⁵ Napier, 7th Feb. 1828, 6 S. 500; Barbour, 27th May, 1828, 6 S.

³ Smail, 16th July, 1847, 9 D. 1502.

860.

there is but one safe rule, that whoever produces in judgment an unstamped document should put himself *in titulo* to use it; and the claim for the expense of stamping was not allowed. In the case of Stewart, 12th Feb. 1817, F.C., the expense of stamping a mutual contract, including the penalty and solicitor's charges, was ordered to be borne by the parties equally; and, as stated in branch 3 of this Answer, the same rule was followed in the case of Smail, here quoted; and in Logan, 6th March, 1850, 12 D. 841, in both of which cases the deeds were of the same description. In Cheyne, 20th June, 1863, 1 M.P. 960, which was an action on a bond or letter granted to procure a debtor's release from custody, where the defender, who was found liable, had pleaded the objection, he was subjected in payment of both the duty and penalty—the Lord President observing that he had not found any case “in which the stamp-duty and penalty have been separated,” and referred to Boyd, 14th Feb. 1824, 2 S. 712. *Ques.* What if the objection were taken by the Court? The same rule would probably be followed.

(1.) Unstamped documents are inadmissible in evidence in civil causes; but they are admissible in criminal proceedings.¹

(2.) An unstamped deed may be used by a witness to refresh his memory, where it is competent to prove the matters to which it relates by parole evidence.²(i)

(3.) An unstamped writ may be used to prove facts *collateral* to its purpose; as a receipt for rent for the purpose of proving tenancy, on the principle that it is not the duty of Courts "to strain the construction of the Stamp Acts so as, without regarding the object of the Legislature, to deprive parties of the means of evidence."³(l)

[(4.) An unstamped document may be received in evidence in a Civil Court, if it can be legally stamped after execution, on

¹ 17 & 18 Vict. c. 83, § 27.

of L., 6 Bell's App. 374,(k) p. Lord

² Dickson's Evid. i. 522 (§ 1014).

Brougham; Bannatyne, 13th Dec.

³ Matheson, 27th March, 1849; H. 1855, 18 D. 230.

(i) It would perhaps be more accurate to say, "to prove by parole the matters which it sets forth." If the witness has become blind since the deed was written or signed, it may be read over to him.

(k) Reversing judgment of Court of Session, 27th March, 1849, 9 D. 1366.

(l) In Matheson's case (note 3), in H. of L., Lord Chancellor Cottenham stated that the question whether an unstamped deed is tendered for a collateral purpose does not depend on whether the obligation, discharge, or other matter to which the stamp applies, is directly or is only incidentally involved in the issue, but upon whether the document is tendered in order to prove that there has been such an obligation or discharge, whatever bearing, direct or collateral, that fact may have upon the cause.

Lord Brougham observed—"If the document is used in a way to mix up with it the receiving or paying of money, so that, upon the whole, a receipt of money is the matter for which, or in respect of which, or connected with which, the document is used, it requires, past all doubt, to have a stamp, because it is in one way or another used as a receipt. But if the same document is used for a totally different purpose, it is to me perfectly clear that it is not to be regarded as a receipt.

Per Lord Campbell—"If a document, purporting to be a receipt, but unstamped, is offered in evidence for any purpose during a trial, if it would be evidence when stamped as a receipt, to establish any point that is litigated between the parties, it cannot be received for a collateral purpose, merely by the parties saying, 'I offer it for a collateral purpose, and let the receipt part be taken *pro non scripto*.'"

In this case (Matheson) the question was as to the admissibility of an unstamped receipt for an admitted payment, tendered to prove, by an

payment to the officer of Court of the unpaid duty and penalty, and a sum of £1; Stamp Act, 1870, § 16. Section 44 of the Customs and Inland Revenue Act, 1881, makes the section of the Stamp Act applicable in proceedings before an arbiter.]

189. What is the legal effect of after-stamping deeds?

The general rule is, that after-stamping operates *retro* to the date of the deed, and will make it effectual from the first. And,

(1.) If the deed be stamped before decree is pronounced in an action founded on the deed, it will be effectual from its date.(*m*)

(2.) If the objection be not stated, and not noticed in the interlocutor in the cause, the deed will be effectual from its date.(*n*)

(3.) It is not safe to execute diligence on an unstamped deed, and trust to after-stamping; for, if the diligence be suspended, the Court will not delay disposing of the suspension until the deed is stamped.(*o*)

(4.) The user of an unstamped deed may be found liable in the expenses of process incurred before stamping.

190. May a deed executed in France, and another executed in Canada, receive effect in this country, both being ineffectual by the *lex loci contractus* from want of a stamp? State the reasons.

admission therein contained, the accuracy of an account and balance therein referred to. It was rejected by the Court of Session, but admitted by the House of Lords.

(*m*) A competitor for the office of trustee in a sequestration was unsuccessful in the Inferior Court, in respect of the rejection of a document for want of a stamp; having got it stamped, he appealed, and the Court recalled the judgment, and appointed him trustee; Ironside, 25th June, 1847, 19 Jur. 597.

(*n*) This answer seems to refer to a deed that has never been stamped.

(*o*) In a suspension and liberation on the ground of an assignation of a bill, &c., not being stamped, warrant of liberation was, in the Bill Chamber, granted without caution. The case having been heard on the passed note, the Lord Ordinary suspended the letters and charge *simpliciter*. The charger reclaimed, and in the meantime got the deed stamped, after which the interlocutor was recalled, and the letters and charge were found orderly proceeded; King, 18th Dec. 1844, 7 D. 228.

(1.) The deed executed in France, though null by the laws of that state from want of a stamp, will receive effect in this country ; because the courts of one state are not bound by the law of nations to enforce the revenue laws of another. [See in confirmation as to a bill drawn out of Scotland, Stewart, 9 M'P. 1057.]

(2.) But the deed executed in Canada, if null there from want of a stamp, will likewise be ineffectual here ; because the reciprocal enforcement of the Stamp Laws of this country may be secured in the Colonies.¹(*p*)

IX. CLAUSES COMMON TO MOST DEEDS.

(1.) *Narrative.*

191. What is the effect of deeds in which the granter or one of the witnesses is not designed, but can easily be identified ? State the reason.

(1.) Deeds in which the granter is not designed are valid, if there be no doubt of his identity ;(*r*) but an exception obtains in the case of deeds granted under the Entail Amendment Act, 1848, it being indispensable in such deeds to specify the granter's designation and place of abode.(*s*)

(2.) A deed wanting the designation of one of the witnesses is null ; because that is a statutory solemnity not suppliable by condescendence.² [But see Ans. 15.]

¹ Dickson's Evid. i. 516 (§ 1003).

² 1681, c. 5.

(*p*) See Tilsley on the Stamp Laws, pp. 282, 3, where the same view is stated, though, it is added, without any direct authority for the distinction as to the Colonies.

(*r*) The evidence of the granter's identity, however, must be found in the deed itself, so that it must contain some description of him, as by his profession or residence, &c., though there is no fixed rule as to the kind of description, provided it be sufficient. There is a case (Dickson, 22nd Dec. 1710, M. 16916) in which an assignation by the husband to the wife in a marriage-contract was sustained, though the husband, who was also the writer, was not designed either in the deed or in the testing-clause ; but were the case occurring now, the result would probably be different.

(*s*) The residence of parties is required in certain proceedings under the Act (see §§ 6 and 33, and Jur. Styles, i. 278 *et seq.*), but not apparently in all deeds granted under its provisions.

192. Does a party require judicial authority for changing his name ?

Judicial authority is not required in the general case [see in confirmation, Forlong, 7 R. 910];^(t) but a notary public cannot execute instruments by a name different from that which he had when admitted, without authority to that effect from the Court.

193. Is it indispensable that deeds express the cause of granting ?

A statement of the consideration is indispensable,^(u) under the Stamp Acts, in deeds of conveyance and sale [Stamp Act, 1870, § 10]; and although in other cases a specification of the cause of granting may not be essential, it is always advisable to insert it, not only for the elucidation of the deed, but because that is the criterion for determining the kind of warrantice implied in the transaction.¹

(2.) *Clause of Warrantice.*

194. Define Warrantice.

Warrantice is an obligation by the granter that the subject of the grant shall be effectual to the receiver, and not be evicted from him by any one having a better or preferable title ; and, without any special clause, it is implied in all deeds, either in a more extended or in a more limited degree, according to the nature of the right.²

195. Enumerate the different kinds of warrantice, and specify the classes of deeds to which they respectively relate.

¹ Menzies Lect. 145 (151).

² Ersk. 2, 3, 25.

(t) See observations *per* Lord President Hope in Young, 14th Jan. 1835, 13 S. 26 ; Kinloch, 13th Dec. 1853, 16 D. 1819. In earlier cases (Muir, M. 7448 ; Mow., Act of Sederunt, 11th August, 1789) authority had been granted ; and it was again granted, Inglis, 29th Nov. 1837, 16 S. 111. The rule in England in this respect is different.

(u) If by "indispensable" it is meant that the omission to recite the consideration money would render the conveyance null, this statement is incorrect. The omission involves very heavy penalties to the parties, and also to the agent, but not nullity of the deed ; 48 Geo. III. c. 149, §§ 22 to 25.

(1.) *Simple* warrantice; securing the grantee against the granter's future deeds, except such as he was previously bound to execute; posterior deeds inconsistent with the right being deemed fraudulent. This is the warrantice implied in gratuitous deeds.

(2.) Warrantice *from fact and deed*; securing the grantee against the past and future deeds of the granter. It is the warrantice implied in transactions and sales for an inadequate price; and it is that which is generally expressed in conveyances of personal rights.(x)

(3.) *Absolute* warrantice at all hands, and against all mortals; protecting the grantee not only against the acts of the granter and his predecessors, but against all defects that may appear to have been in his right antecedently to the grant. But liability under the warrantice is incurred only upon eviction arising from defect of right, and not from the nature of the subject, nor from a *damnum fatale*, nor from a supervenient law. It is implied in all onerous deeds,(y) and it is inferred by the statutory clause, "I grant warrantice," in land rights, whether onerous or gratuitous.

(4.) *Real* warrantice, when express, is where one heritable subject is disposed to the purchaser of another, in security against eviction of the latter. It is implied in excambions, and gives either of the parties recourse upon his own original lands, in the event of his being evicted from the lands acquired by him in exchange.¹

196. A debt of £1000 being assigned for an onerous consideration, with warrantice from fact and deed, and no debt being found to exist, has the assignee any claim; and if so, against whom, to what extent, and upon what ground?

The assignee has a claim against the cedent for the full amount of £1000; because warrantice from fact and deed in an

¹ Ersk. 2, 3, 25 *et seq.*; Bell's Prin. 122 *et seq.*

(x) And in assignments of debts and securities.

(y) This goes rather too far. *Absolute* warrantice is implied in irredeemable conveyances of land and other heritable subjects for an adequate price; but not in conveyances of debts, obligations, and securities, though these also may be, and generally are, onerous.

assignation of debt does not exclude the implied warrantice of *debitum subesse*.¹ It is said that in redeemable and personal rights the measure of the warrantice is the sum actually paid ;² but this doctrine is disputed by Erskine.³

197. Two debts being assigned for a full price, one with warrantice at all hands, and the other with warrantice that the debt shall be good, valid, and effectual to the assignee ; Has the assignee any claim against the cedent, under either assignation, on the bankruptcy of the debtor ? State the reason.

The assignee has no claim against the cedent under either assignation ; because absolute warrantice in an assignation of a debt, or that it shall be good, valid, and effectual, does not imply that the cedent guarantees the *solvency* of the debtor, which is a matter extrinsic of the obligation ; but only (1) that the debt exists, and (2) that the cedent's title is unexceptionable.⁴

198. The estates, called A and B, having been sold for a full price, with warrantice from the seller's facts and deeds, the former was evicted from the purchaser in consequence of a defect in the title of the seller's ancestor, and the latter was carried off by an adjudication, led upon a preferable security granted by the seller ; Has the purchaser any claim under the warrantice against the seller ?

(1.) The purchaser has no claim against the seller in respect of the estate of A ; because the eviction was not occasioned by the fact or deed of the seller, and warrantice from fact and deed does not secure the grantee against the acts or omissions of the granter's predecessors or authors, unless it be so expressed.

(2.) The purchaser has a claim under the warrantice in respect of the estate of B, entitling him to demand that the seller shall instantly procure a discharge of the security and adjudication ; or, if the adjudication has become irredeemable, pay the value of the estate at the date of the eviction ; the ground of the claim being that the warrantice expressed in the conveyance gives protection

¹ Ferrier, 16th May, 1828, 6 S. 818.

² Ersk. 2, 3, 30.

³ Stair, 2, 3, 46 ; Bankton, 2, 3, 124 ; Menzies Lect. 153 (158).

⁴ Barclay, M. 16591 ; Liddel, M. 16594.

against the acts or deeds, past or future, of the seller ; and that the eviction of the estate resulted from a deed granted by him.

199. If a husband, after burdening his estate with heritable securities, were to dispoise it gratuitously to his wife in liferent, without express warrantice, or with absolute warrantice, or with the clause "I grant warrantice;" Would she be entitled to be relieved of the interest of the securities?

(1.) If no warrantice were expressed, the wife's right would be burdened with the interest of the securities ; her right being gratuitous, in which simple warrantice is implied.

(2.) If the wife's disposition contained a clause of absolute warrantice, she would be entitled to be relieved of the interest ; because express warrantice prevails over that which is implied.¹

(3.) If the disposition contained the clause "I grant warrantice," the wife would be entitled to relief of the interest ; because that clause imports absolute warrantice, whatever may be the nature of the transaction.

200. Where a deed contains a clause expressly exempting the granter from warrantice, may he grant an inconsistent deed?

No ; because posterior deeds inconsistent with the grantee's right are deemed fraudulent ; and "no agreement, let it be ever so explicit, ought to protect against the consequences of fraud and deceit."²

201. The rental of lands allocated for a widow's jointure being warranted to amount to a certain sum yearly, is the warrantice incurred by a diminution of the rental caused by a *damnum fatale*?

Yes ; "because, in the case stated, the granter is precisely

¹ Strong, 29th Jan. 1851, 13 D. 548.(2).

² Ersk. 2, 3, 27.

(2) The same has been found in a case less favourable for giving effect to the principle ; Coventry, 8th July, 1834, 12 S. 895.

obliged that the widow shall in no case have a less jointure than the yearly sum mentioned in the contract."¹(a)

202. When does a claim upon the warrandice arise?

A claim upon the warrandice does not arise till eviction, resulting from the deeds of the granter, if the warrandice be from fact and deed, or from a defect in the right, if the warrandice be absolute, unless there be a plain ground of distress.²(b)

203. Contravention of warrandice being incurred by eviction, is it sufficient for the seller to offer payment to the purchaser of the price he paid for the subject, with interest from the time of eviction, and his expenses of defending the action? State the reason.

The offer is not sufficient; because warrandice is intended not merely for indemnifying the purchaser, but for securing him against all the consequences of eviction; and he is therefore entitled to the full value of the subject as at the time of eviction, together with the whole loss and damage he may have sustained.³ [See, as to effect of diminution in value, Cairns, 9 M'P. 284.]

204. Is it a sufficient answer on the part of a seller to an action brought against him upon the warrandice, that the action of eviction was not intimated to him by the purchaser; or that the purchaser refused to defend that action; or that, having defended it, he omitted to state the proper defence?

It is not a good defence that the purchaser did not intimate the action of eviction,⁴ at least it is so stated by Erskine;⁵ but in

¹ Ersk. 2, 3, 29.

² Ersk. 2, 3, 30.

³ Ersk. 2, 3, 30.

⁴ Clerk, M. 16605; Dewar, M. 16637.(c)

⁵ Ersk. 2, 3, 32.

(a) The warrandice, however, would not protect the widow against additional taxes imposed by statute.

(b) That is, some cause of eviction arising from deeds of the granter inconsistent with the warrandice.

(c) The point in Dewar was not as to intimation. A bond had been granted over the subjects by the disposer's author, which had been allowed to remain personal, and of which the disposer was not aware. He was not himself infest,

any view it would be a highly imprudent omission ; nor is it a valid defence that he refused to defend it ;¹ but it is a good answer to the action against the seller that the purchaser defended the action of eviction and omitted to state the proper defence.²

205. Where the purchaser has undertaken the defence of an action of eviction, is he entitled to payment of his expenses from the seller when the defence has been successful, the pursuer being insolvent ; or when it has been unsuccessful ?

(1.) When the defence has been successful, the purchaser is not entitled to his expenses from the seller ; because no claim on the warrantice arises till eviction.³

(2.) When the defence has been unsuccessful, and not mismanaged, the seller is bound to indemnify the purchaser for his expenses ; because these are a part of his loss and damage resulting from the eviction.

206. Where a purchaser sustains loss in consequence of a latent defect in goods for which he has paid a full price, has he any claim against the seller, the defect being unknown to either party ?

The purchaser has no claim against the seller for loss on the goods occasioned by a defect unknown at the time of the sale ; the goods, with all their faults, being at the risk of the purchaser unless the seller shall have given an express warranty of the quality or sufficiency of the goods, or unless they have been expressly sold for a specified and particular purpose, in which case the seller is considered, without such warranty, to warrant that the same are fit for such purpose.⁴ [Rose, 5 R. 603. Remarks on meaning of "express warranty."]

¹ Downie, 31st Jan. 1815, F.C.

² Inglis, M. 16633.

³ Inglis, M. 16633.

⁴ 19 & 20 Vict. c. 60, § 5.

and in his disposition he assigned the open procuratory in his favour. Had the disponee at once completed his right by infeftment, he would have excluded the bond ; but he delayed doing so, and in the meantime the bond was made real ; and the disponee having been obliged to pay it, brought an action of relief against the disponent, who pleaded that the eviction having arisen not from any act of his and solely through the delay in completing the disponee's right, he was not liable ; but the Court found that he was.

(3.) *Clause of Registration.*

207. Enumerate the different parts of which the clause of registration for preservation and execution consists.

(1) The consent to registration in the judges' books; (2) the purpose of registration, being for preservation and that all necessary execution upon six days' charge may follow; (3) upon a decree to be interponed to the deed; and (4) the appointment by the granter of a procurator to appear *fictione juris* for him, and consent to decree.^(e) [The enactments mentioned in the note are now superseded by section 138 of the Consolidation Act, 1868, which expressly provides that the short clause of registration is applicable to all deeds, whether relating to land or not.]

208. From what origin is the clause of registration for execution said to be derived; and on what principle does diligence on a registered bond proceed?

(1.) The clause of registration for execution is said to be derived from the juratory clause of performance and consent to excommunication inserted in deeds before the Reformation, on which, upon failure of the granter, letters of cursing were issued against him by the authority of the Ecclesiastical Courts, followed, in the

(e) It is not now necessary to insert those particulars in the clause of registration. In the form of a bond and disposition in security in Schedule (A), annexed to the 10 & 11 Vict. c. 50, the clause is simply "I consent to registration for preservation and execution," which it is declared, by § 2 of the Act, "shall import a consent to registration and a procuratory for registration in the books of Council and Session, or other judges' books, competent for preservation, and that letters of horning on six days' charge, and all other necessary execution, may pass on a decree to be interponed thereto." The Schedule (A), annexed to the Act 10 & 11 Vict. c. 48, contains the following form of the clause to be inserted in dispositions, viz.—"I consent to registration hereof for preservation (*or*, for preservation and execution)," which is by § 3 of the Act declared to have the same import and meaning as is above stated; and by "The Titles to Land (*Scotland*) Act, 1860," § 30, it is declared that "The short clauses of consent to registration for preservation, and for preservation and execution, set forth in the Schedule (A), annexed to the Act 10 & 11 Vict. c. 48, shall, when occurring in any deed or writing whatever, have the like meaning and import as by the said Act is attributed to them when occurring in any disposition, conveyance, deed, or instrument referred to in the first section of the said Act." The short form may therefore now be used in all deeds containing a clause of registration. See Dimpsey, 17th July, 1863, 1 M.P. 1126.

event of his continuing "obstinate and unrepentant," by letters of caption in the sovereign's name.¹

(2.) A registered bond is, in principle, a judicial decree pronounced, *fictione juris*, on the appearance of the granter, by his procurator, before the judge, and consenting that sentence should go out against him, conform to the deed. The decree being regulated by the terms of the deed, and the deed being the only warrant of the decree, it is copied into the Books of the Court, and an extract of the procedure given out, under the hands of the clerk for the purpose of execution.²

209. What reason is there to suppose that the formality of attendance and consent to decree of registration were ever observed?

(1.) In Queen Mary's Instructions to the Commissaries, given in the year 1563, it is declared to be lawful to the commissaries to cause their clerks register contracts, obligations, and other writs, given *in scriptis*, subscribed by the parties, or by notaries at their command, in their books; but it is provided that no contract, obligation, or other writ, be received or registered without the judge being present to hear the same read, and interpose his authority thereto.³

(2.) The Act 1584, c. 4, dispensed with the sealing of deeds which contained a consent to registration in any judge's books, on the ground that registration is "ane greater solemn act nor the sealing thereof;" the solemnity of the act consisting in the granter's appearing before the judge to assent to decree in terms of the deed, and thus adopting it in presence of the Court.

(3.) The Act 1597, c. 269, ordained that all hornings, inhibitions, &c., should be registered in time coming, either judicially or before a notary and four witnesses besides the ordinary clerk.

(4.) By Act of Sederunt, 9th December, 1670, warrant is granted to the Lord Clerk-Register, and his deputies, to insert the consent of advocates as procurators to the registration in bonds, contracts, and other writs given in for registration, as they were in use to do formerly, and to give out extracts thereof, notwithstanding that the advocates do not subscribe their consent; and it is declared,

¹ Ross Lect. i. 96 and 105 *et seq.*

² Ross Lect. i. 98 *et seq.*

³ Balfour's Pract. 658 (*sub voce* Commissariat).

that extracts cannot be quarrelled upon the ground that the advocates' consent to the registration is not subscribed.

210. Mention a form in English practice analogous to the Scottish decree of registration.

The English warrant of attorney to confess a judgment is analogous to the decree of registration, being a mandate granted by the debtor to some nominee of the creditor, to consent that decree be pronounced against him in favour of the creditor for the amount of the debt.¹

211. What is the meaning of the words, "and for the greater security, I consent, &c.," introductory to the old form of the clause of registration, as in Dallas' Styles?

The words, "for the greater security," referred to the ancient rule of law, by which priority in preferences depended on the date of the decree and not of the diligence.²

212. What is the meaning of the blank and the "&c.," occurring in the clause, "and thereto constitute my procurators, &c."?

The blank is for the name of the granter's procurator appointed for the purpose of consenting to decree of registration; and the "&c." is in place of the full enumeration of the procurator's powers, which formerly were subjoined to the clause.³

213. On what principles were deeds formerly not registrable after the death of the granter or grantee, and by what authority was registration made competent after the parties' decease?

The principles on which deeds formerly could not be registered after the death either of the granter or grantee were, that the procuratory for registration, being a mandate, fell by the death of the parties; and that registration was a decree of consent, which required *actor et reus*.⁴ The inconvenience resulting from this rule was removed, as regarded the grantee, by the Act 1693, c. 15, which authorised the registration of writs, after the death of the creditor, upon production of the title of the holder, whether a ser-

¹ Ross Lect. i. 96; Menzies Lect. 156 (161).

² Ross Lect. i. 102, 112.

³ Menzies Lect. 158 (163).

⁴ Ross Lect. i. 117.

vice, confirmed testament, or assignation ; and by the Act 1696, c. 39, it is declared that all bonds, dispositions, and other registrable writs may be registered after, in the same manner as before, the granter's death. In practice, the provision in the former of these acts, requiring the production of the title, is now disregarded.

214. May deeds be registered for preservation, publication, or execution, without a clause of registration ?

(1.) Without a clause of registration deeds cannot be registered for preservation in the Register of Deeds ; but they may be registered in the Register of Probative Writs.¹ [See 31 & 32 Vict. c. 34, § 2. Probative writs are now kept at the Register.]

(2.) All deeds, instruments, and decrees, relating to heritage,² and long leases, assignations, and extracts thereof,³ may be registered for publication in the Register of Sasines, without a clause of registration.^(h) [From 31st December, 1868, all writs recorded in the General Register of Sasines require warrants of registration.]

(3.) Crown charters are registered in the Register of the Great Seal, without a clause.

(4.) Deeds cannot be registered for execution without a clause for that purpose ; except protests of bills and notes,⁴ and Exchequer bonds.⁵

215. What is the duration of a charge on a registered deed or bill protest ; and in what cases is it limited to six days, without an express consent ?

Without an express limitation, the duration of a charge on a registered deed is fifteen days ; but the charge upon a bill protest, and upon registered deeds granted under the Lands Transference Act,⁽ⁱ⁾ the Heritable Securities Acts, and the Registration of Leases Act are limited to six days, without an express consent to

¹ 1698, c. 4.

² 21 & 22 Vict. c. 76.(g)

³ 20 & 21 Vict. c. 26, § 1.

⁴ 1681, c. 20 ; 1696, c. 36, 12 Geo.

III. c. 72.

⁵ 19 & 20 Vict. c. 56.

(g) §§ 1 and 36. This Act (Titles to Land Act, 1858) applies to lands not held burgage. The 23 & 24 Vict. c. 143 (Titles to Land Act, 1860) contains similar provisions as to lands held burgage ; §§ 2, 3, and 13.

(h) But in certain cases warrant of registration is required.

(i) 10 & 11 Vict. c. 48, and c. 49.

that effect. [The provisions of the two first-named Acts are substantially repeated in the Consolidation Act, 1868.]

216. Enumerate the registers for publication [as existing prior to 31st December, 1868].

(1) General and Particular Register of Sasines ; (2) Register of Entails ; (3) Register of Adjudications ; (4) General and Particular Register of Inhibitions ; (5) Register of Interdictions ; (6) Registers of Inventories of Heirs entering *cum beneficio inventarii* ; (k) (7) Register of Interruptions of Prescriptions.

[**217.** Enumerate the Registers for publication now subsisting.

(1) General Register of Sasines, divided into counties ; (2) Register of Entails ; (3) General Register of Inhibitions and Adjudications ; (4) the Burgh Register of Sasines for lands in each royal burgh in which such a register has been in use to be kept.]

218. Enumerate the local registers [as existing prior to 31st December, 1868] ; specify the description of instruments for which they are respectively intended ; and state which of them were transmitted to the General Register House.

(1.) County Register of Deeds, for all descriptions of deeds containing a clause of registration, except charters, (l) and for bills and notes. Extracts from these registers do not warrant execution against parties not resident within the jurisdiction.

(2.) County Register of Probative Writs, for all deeds not containing a clause of Registration.

(3.) Particular Register of Sasines, for instruments relating to lands within the district.

(4.) Particular Register of Inhibitions, for inhibitions against parties having lands within the district.

(5.) Burgh Register of Deeds ; and

(6.) Burgh Register of Probative Writs, for deeds and writs by burgesses or parties domiciled within the burgh.

(7.) Burgh Register of Sasines, for subjects held in burgage tenure.

(k) In consequence of the alterations in the practice as to the service of heirs, introduced by the 10 & 11 Vict. c. 47, this register is now in disuse.

(l) And deeds of entail.

The Particular Registers of Sasines and Inhibitions for the county were transmitted periodically to the General Register House, the others remained permanently in their respective localities.

[219. What local registers still subsist ?

The Sheriff-Court Books of each county, and the Burgh-Court Books of each burgh having such a court, in all which registers deeds and probative writs may be recorded for preservation : the Burgh Registers of Sasines above mentioned wherein deeds are recorded for publication.]

[220. Enumerate briefly the leading enactments of the Lands Registers (Scotland) Act, 1868.

(1) The General Register of Sasines is divided into counties. (2) A writ comprising lands in more than one county is recorded at length in the division for one county, and by memorandum in others. (3) All writs are to have a warrant of registration specifying the county or counties. (4) Writs may be transmitted by post to the General Register. (5) All Particular Registers of Sasines are to be discontinued not later than 31st December, 1871. (6) With a special form of warrant registration in the Sasine Register is to be equivalent to registration in the Books of Council and Session. (7) The Register of Interruptions of Prescriptions is discontinued. (8) The Particular Registers of Inhibitions and Interdictions are abolished. (9) The General Registers of Inhibitions and Adjudications are to form one register.]

221. Within what time must a deed be recorded after presentation ; may it be borrowed up after its ingiving ; and if so, upon what conditions ?

By the Act 1685, c. 38, the deed must be recorded within twelve months after the date of presentation ; but it may be borrowed up within six months if it has not been booked. [See, however, addition to Ans. 36.] The Act applies only to deeds recorded in the Books of Council and Session. After a deed has been recorded, it cannot be removed from the register unless by warrant of the Court, which will be given only on proof of necessity, and of the insufficiency of an extract. If production of a deed is required within a reasonable distance, it is produced under custody of an officer of Court ; and when it is necessary to send it

to a great distance, surety must be given for its safe return within a certain period, and an extract duly authenticated is, in the meantime, lodged in its stead.¹(*n*)

222. Does action lie at the instance of a merchant against a trade protection society for publishing his name in a list of dishonoured bills copied from the Register of Protests, for the information of its members, the bill in question having been granted for the accommodation of another?

Action in the ordinary case does not lie against the society; because all records are by statute made patent to the public, and decrees of registration being equally open to the public, may be published as decrees *in foro contentioso*.²

(4.) *Testing Clause.*

(See Solemnities of Deeds, page 1.) (*o*)

X. BLANK WRITS.

223. What is the effect of blanks in settlements, and of bonds blank in the creditor's name? State the reasons.

(1.) Important blanks in settlements annul (*p*) the deed at

¹ Menzies Lect. 164 (170) *et seq.*,
and cases cited.

² Newton, 10th March, 1846, 8 D.
667, reversed in H. of L., 17th Feb.
1848, 6 Bell's App. 175.

(*n*) A petition lately presented for warrant to the Lord Clerk-Register, or other officer of records, to exhibit in the Court of Chancery in England certain deeds recorded in Books of Council and Session, was, after communication with the Vice-Chancellor, refused, on the ground that the Court's control over the deeds could not be insured if they were sent to England; Young, 2nd Feb. 1866, 4 M.P. 344. In a prior case (*Shedden v. Patrick*), deeds so exhibited in the Probate Court had been taken from the officer, and detained.

(*o*) By "The Companies Act, 1862," the memorandum and articles of association, and by the Merchant Shipping Act of 1854, bills of sale or venditions, and mortgages of ships, do not require testing clauses in the Scotch form; *supra*, Ana. 8, note (*e*).

(*p*) It is not here meant that such blanks necessarily annul the deed *in toto*. Settlements generally contain provisions separate and independent of each other; and where they do, such of the provisions as are not liable to the objection stated are valid, while the others are not.

common law ; “because the duty of a Court is to construe and give effect to a party’s expressed intention, not to construct for him a deed which he failed to make.”¹ But where the substance of the granter’s meaning can be ascertained, the occurrence of blanks will not be allowed to defeat his intention ; and where a deed containing blanks, even in essentials, confers on trustees or other persons power to fill up the blanks (r) it will be effectual.²

(2.) Bonds blank in the creditor’s name are null under the Act 1696, c. 25, for the reason, that as such deeds passed by delivery from hand to hand, they were secure from the plea of compensation ; their contents could not be attached by diligence ; and they could be used for evading the law of deathbed.³ [Reduction on the head of deathbed is not now competent.]

224. What are the provisions of the Act 1696, c. 25, anent blank bonds ?

It statutes and ordains that “No bonds, assignations, dispositions, or other deeds be subscribed blank in the person or persons’

¹ Dickson Evid. i. 352 (§ 645).

& S. 328, p. Lord Wynford (reversing

² Ewen, (s) 17th Nov. 1830, 4 W. 6 S. 479).

³ Dickson Evid. i. 353 (§ 649).

(r) The expression here used is perhaps not the most appropriate to convey the meaning intended, and it is just possible may cause misapprehension, as such blanks in settlements are never filled up in the deeds ; and the practical question that arises is, whether some provision or bequest (generally for charities), being indefinite or incomplete in its terms, is void from uncertainty, or power has been given to the trustees or others to supply what may be wanting, and so make it effectual.

(s) In Ewen, the deed did not confer power on any one to supply the particulars that were left blank. The Court of Session held they were unimportant, and might be supplied notwithstanding the absence of such conferred power, and so sustained the provision ; but the House of Lords reversed. In connection with this subject, reference may be made to Mags. of Dundee, 26th June, 1857, 19 D. 918 ; as reversed, H. of L., 11th May, 1858, 20 D. 9, 8 Macq. 134, where it was held that the purpose to found a hospital could be gathered from testamentary writings, though the word “hospital” had been deleted, and that the Court of Session should prepare a scheme for carrying out the purpose ; and observed, that in construing holograph testamentary writings, words deleted may be looked at as showing what was in the mind of the testator, and that they may even sometimes be restored, it being a question of evidence whether the deletion was intentional or not.

name in whose favour they are conceived, and that the foresaid person or persons be either insert before or at the subscribing, or at least in presence of the same witnesses who are witnesses to the subscribing before the delivery, certifying that all writs otherways subscribed and delivered blank, as said is, shall be declared null ;” “declaring that this Act shall not extend to the indorsation of bills of exchange, or the notes of any trading company.”

225. What is the description of writings contemplated by the Act 1696, and what kind of writs are exempted from its provisions ?

The deeds contemplated by the statute are formal deeds, requiring the observance, when not holograph, of the statutory solemnities of authentication. Accordingly, bills and notes blank in the payee's name,¹ indorsations of bills, drafts and orders *in re mercatoria*, and bills of lading, are exempted;² but the documents usually termed *iron scrip*, it is thought, are struck at by the Act.³(*t*)

226. A subscribed and delivered to B an obligation, undertaking “to deliver, when required, 200 tons of iron to the party lodging this document with me ;” and B blank indorsed and delivered the writ to C, in security of advances ; Has C a good title to sue for delivery of the iron ? State the reason.

No ; because the document is struck at by the statute as being blank in the creditor's name, and even although the creditor were named in the writ, it is not transferable by indorsation.⁴(*u*)

¹ Ogilvie, 28th June, 1804, M. App. “Bill of Exchange,” No. 17.

² Dickson Evid. i. 354 (§§ 651 and 786).

³ Bovil, 29th July, 1856, H. of L.

³ M'Q. App. 1, p. the Lord Chancellor.

⁴ Bovil, *supra* ; Commercial Bank, 27th May, 1859, 21 D. 864.

(*t*) The documents here referred to are invalid, but not on the ground here stated. See note (*u*), below.

(*u*) In the case of the Commercial Bank, referred to, the obligation was not blank in the party's name ; its terms were—“To Joseph Dods, Esq., Glasgow.”—(*date*)—“Sir, We hold on your account, and undertake to deliver, when required, to your order, 200 tons of railway chairs, &c., we having been

227. If a completed entail were blank in the first substitute's name, or blank in the fourth substitute's name, would it be binding on the second substitute, he being the institute's heir-at-law; or would he be entitled to take up the estate as heir in fee-simple?

(1.) If the entail were blank in the first substitute's name, it would not be binding on the second substitute, who, being the institute's heir-at-law, could make up titles to the estate unfettered by the entail.¹

¹ Abernethie, 16th Jan. 1835, 13 S. 263 ;(v) Kennedy, M. 1681.

paid the price by Mr. MacCulloch. We are," &c. Six years had elapsed before any claim had been made on it. The Court expressed an opinion that it had been granted, not *in re mercatoria*, but as a means of raising money; but the ground of judgment was, that it had not been validly transmitted to the pursuers. In the earlier cases of Bovil, 21st Feb. 1854, 16 D. 619; Mackenzie, 7th Dec. 1853, 16 D. 129; and Dimmock, 1st Feb. 1856, 18 D. 428, it was deliberately held in the Court of Session that such documents are not struck at by the Act 1696, and were transmissible by delivery or indorsation, according to circumstances; but when the case of Bovil went to the House of Lords, although the judgment of the Court below, sustaining the claim for delivery of the iron, was affirmed, it was so on special grounds, and the principle of the judgment was not affirmed, the Lord Chancellor (Cranworth), on the contrary, observing that he held the document to be invalid. It was after that judgment in the House of Lords, and in conformity with the views there expressed, that the case of the Commercial Bank was finally disposed of in the Court of Session. The objection, therefore, to such documents, when blank, is at common law, and not under the statute. Mr. Skelton, in a note (Dickson Evid. § 786), expresses an opinion, that had the document founded on in Commercial Bank "passed between parties to a sale, it would probably have been regarded as a writ *in re mercatoria*," in respect of the party being named. The opinion of Lord Chancellor Cranworth was very strong against such documents being so regarded when blank, but there are reasons in that case which do not apply to the other. It may farther be observed, that although a special usage of trade may confer the privilege of transmissibility by indorsation, such privilege is not necessarily inherent in documents granted *in re mercatoria*, one evidence of which is, that it required a special statute to make promissory-notes so transferable.

(v) The case of Abernethie refers properly to the second branch of this Answer. The principle of the rule here stated was applied in Shepherd, 24th Jan. 1844, 6 D. 464, where the name of the first substitute or conditional institute being written on an erasure wherever it occurred throughout the deed, it was held that this was a vitiation *in substantialibus*, and fatal to the whole entail. This case, however, was one, not under the statute, but at common law.

(2.) If the entail were blank only in the fourth substitute's name, it would be binding on the second ; as a blank in the name of a postponed substitute does not annul an entail as regards substitutes nominated before him.¹

228. Is it a relevant objection to a bond that the sum was not filled up when it was signed ?

No ; there must be an averment that it was filled up without the consent and authority of the granter, or an allegation that it was not completed before delivery.²(x)

229. A grants to B a letter of guarantee "for any goods which you may furnish to C, to the amount of £ ;"
Is the guarantee binding ?

The guarantee is binding, being held not to be blank in *substantialibus*, but to contain a proposed limitation, which had been departed from.³

230. Where blanks in a settlement are filled up by a person authorised by the deed itself, or in compliance with the granter's directions contained in a separate improbative writing ; What is the effect of the deed, the blanks being essential ?

¹ Abernethie, *supra*.

² Buchanan, 17th June, 1828, 6 S.

³ Baillie, 25th June, 1828, 6 S. 986.

1016 ; E. of Buchan, 25th Feb. 1857,
19 D. 551.

(x) The important point in this question is, On whom does the *onus* lie ? Must the pursuer prove that the blank was not, or the defender that it was, filled up with his, the pursuer's authority ? In E. of Buchanan (cited) it was held that the pursuer was not bound to put in issue anything, but that the blank was in the deed when subscribed, and that the defenders must show that it was filled up with his authority ; but the case was peculiar, the deed being not an ordinary bond for repayment of a principal sum, but a redeemable bond of annuity and disposition in security, and the blank left being for the redemption money, the amount of which, it was said, had not been calculated at the time of signing. Lord Cowan expressed doubts as to adopting the rule as to *onus* as a general one. In Baillie (also cited) a somewhat different view seems to have been taken as to what it is incumbent on the pursuer of such an action to aver and prove, but the case, which referred to an ordinary bond, is very shortly reported.

(1.) Where the blanks are filled up by a person authorised by the deed itself, it is effectual; on the principle that it is lawful for a testator to put the disposal of his property at the will and discretion of another.¹(y)

(2.) Where the blanks are filled up under separate directions the deed is invalid, both under the Act 1696, and at common law.²(z)

¹ Hill, 14th Dec. 1824, 3 S. 389;
Ewan, 17th Nov. 1830, 4 W & S.
346; p. Lord Wynford.

² Pentland, 22nd May, 1829, 7 S.

640.

(y) The questions involved in the cases here referred to were not as to filling up blanks in deeds, but whether certain bequests or directions were void from uncertainty. In Hill, there was no blank in the deed. It contained a general direction to the trustees to apply the residue for behoof of such charitable institutions as they might think proper; and this was held effectual. As to Ewan, see *supra*, note (s), under Ans. 223.

(z) 1. Under the Act 1696.—In the case of Abernethie, *supra*, Ans. 227, one question raised, but not requiring to be decided, and on which the judges expressly reserved their opinion, was whether a deed signed with a party's name blank, which was afterwards filled up in terms of a separate letter of instructions, was valid under the Act. Without venturing to anticipate what the judgment may be when the point arises, there seems to be ground for maintaining the validity, under the Act, of a deed with the name inserted in the manner here stated. All that the Act requires is that the name "be insert, in presence of the same witnesses who are witnesses to the subscribing before the delivery." Now, assuming the condition as to the witnesses to have been observed, and the insertion of the name to have been before delivery, then the only question that could arise would be as to the authority to insert the name, but the Act contains no provision as to this, so that it could be given, and, if necessary, proved in the same way as the authority to prepare the deed, for which there is no prescribed mode, and of which a holograph letter (as in Abernethie) seems to afford sufficient evidence. The granter's presence at the insertion is not required by the Act, but might also be sufficient for the purpose. Further, if it was set forth in the testing clause that the name had been inserted in presence of the subscribing witnesses before delivery, and the writer of the name, where different from the writer of the deed, named and designed, the deed would seem to be in all respects probative, and the Act sufficiently complied with. Without such precautions in the testing clause, the *onus* of proving that the Act had been complied with might, in case of challenge, be laid on the party proponing the deed. It does not appear from the report whether in Kennedy the provision of the Act as to the witnesses had been, and from the Session papers it would appear that in Abernethie it had not been, complied with. There does not seem to be very

231. Where a person executes a settlement, blank, in name of one of the substitutes, and afterwards executes a docquet written on the deed, but before different witnesses, mentioning whose name he wished inserted; Is the blank substitution validly filled up, and is the docquet effectual to any extent?

The blank substitution in the deed is not validly filled up; because the Act 1696 requires that blanks be filled up before the same witnesses who are witnesses to the subscribing before delivery; (b) but the docquet may be sustained as an inde-

much information on this subject in the books, but in Donaldson, M. 9081, it seems to have been held that all that was necessary to support such a deed was to prove that it had been "filled up with the disponent's name in the presence of the witnesses signing to the same." It may also be observed that, in Kennedy, the writer of the docquet on the disposition was the person thereby authorised to insert the names in the disposition itself, so that the absence of the witnesses to the subscribing of it may not improbably have been the reason why the course adopted was followed instead of the natural one, of at once inserting the names in the disposition.

2. At common law.—Pentland's case here cited, is not in point. Two deeds, one complete, and the other having blanks left to allow of alteration, were prepared without instructions from the granter, and sent to him in India, and both were said to have been signed and returned by separate conveyances. The complete deed never arrived, but the other did, signed, and, as was said, approved of, whereupon the agents filled up the blanks, so as to make it correspond with the other. The deed was found null; but, without the other deed, of which time was allowed to prove the tenor, there was not even by inference any direction to fill up the blanks, or evidence of how it was to be done; moreover, it could not be done before the same witnesses; and in the later case of Abernethie, *supra*, where, however, the letter was holograph, the point as to inserting a party's name was held to be open.

This Answer, in its second branch, does not meet the question, the improbable element being omitted; but keeping in view the principles adopted in the cases cited, *supra*, note (n), p. 25, as to separate writings relating to deeds of settlement, the distinction pointed at in the Question in respect of improbable writings is at least too broad at common law.

(b) This is a correct statement of the law, but it will be observed that the point here answered is not that put in the question, which mentions the witnesses to the authority, a matter about which the Act says nothing, but does not state whether or not the blank was filled up before the same witnesses who were witnesses to the subscribing; on the answer to which depends in this respect the question as to the validity of the insertion. See note (2), under *Ans.* 230.

pendent deed of substitution in favour of the persons named in it.¹(c)

¹ Kennedy, M. 1681.

(c) It is to be regretted that the author of the work did not throughout this title keep the questions as to deeds under the Act 1696, c. 25, and those at common law, separate, as this would probably have brought out more clearly the distinctions between the two classes of cases. The Act deals exclusively with the grantee's name and its insertion in the deed, which, if not made before subscription, must be before delivery, and in that case in the way prescribed. The common law applies to other material blanks as well as the name, such as the subject conveyed, the sum in bonds, &c., appearing in deeds of settlement after delivery, but does not require that these particulars shall necessarily be inserted before subscription; and the questions that arise under it are not as to filling up any blanks, or as to when or by what authority blanks had been filled up, but whether the purposes are in themselves, or can by the exercise of powers for that end conferred on trustees or others, either by the deed itself or by separate writing, be made so complete and definite that they can receive effect. Deeds of other descriptions fall under the operation of other rules; see Ans. 228, and note (x).

PART II.—DEEDS RELATING TO PERSONAL RIGHTS.

I. PERSONAL BOND.

232. What was the origin and design of the penal bond ?

The penal bond, designed as a device for evading the prohibition of the Canon Law against usury, was founded on the Civil Law, which, although it likewise condemned a return for the bare use of money, allowed damages to the extent of double the value in sale, location, and certain other contracts, upon the failure of the obligant in performance. The bond anciently in use in England, and bearing a close resemblance to the modern form of that writ, was an obligation by the debtor for double the amount of the loan, qualified sometimes by a memorandum, either separate or subjoined, to the effect that if the debtor paid a certain sum, at a specified date, he should be discharged, otherwise the full amount became due as damages. In Scotland, the lender took a bond without any allusion to interest, but with the penalty of double the amount upon failure, an exaction which was rigidly enforced.¹

233. What change in the nature of the bond was produced by the Act 1587, c. 52 ?

The Act 1587, c. 52, having permitted the taking of interest at the rate of ten per cent. per annum, or five bolls of victual, the large penalty, intended to secure to the creditor a return for his money, fell into disuse, and a clause of annualrent was introduced into the bond, along with a provision that the creditor

¹ Ross Lect. i. 19 *et seq.*; Menzies Lect. 187 (193) *et seq.*

should have power at any time to call up the principal sum. But for about forty years at least before the passing of the Act of 1587 the penalty had been restricted to interest and damages, as appears from a case reported by Balfour, to the effect that by the law of this realm, *pœna conventionalis*, such as a sum of money adjoined to any obligation in name of penalty, may not be asked by any person unless "in so far as he is interestit, hurt, or skaithit, because all sic panis are in ane manner usury and unhonest, made for lucre or gain."¹

234. What was the nature of the ancient Scottish obligation called the Ticket?

The Ticket was an obligation by the debtor, containing an acknowledgment of the debt, and binding him and his heirs to pay the amount to the creditor, "his heirs or assignees, or any having his order," at a specified date, and under a certain penalty. It was thus assignable by indorsation, and when blank indorsed, it was transferable by delivery.²

235. What was formerly the criterion for determining whether a bond for a sum of money was heritable or moveable?

Bonds for sums of money were formerly adjudged heritable if they contained a clause of annualrent, as having thereby a tract of future time, and being made *feuda pecuniæ*. But where it could not be presumed that the creditor intended to allow the money to lie at interest, the natural character of the obligation prevailed, and accordingly, the criterion for determining whether the bond was heritable or moveable was the creditor's intention, as appearing from the structure of the deed, to let the money lie as an investment. And so—(1) the omission of the clause of annualrent made the bond moveable from the first; (2) if the bond bore interest, and had a fixed term of payment, it was moveable till the term of payment was past; (3) if the interest was payable before the principal, the bond was reckoned heritable after the term of payment of the interest; and (4) if the term of payment

¹ Ross Lect. i. 19 *et seq.*; Menzies Lect. 187 (193) *et seq.*; Home, 22nd March, 1548; Balfour Prac. 151.

² Ross Lect. i. 45.

was distant or uncertain, the bond was accounted heritable from the first ; because the distance or uncertainty of the term of payment afforded evidence that the creditor intended from the beginning to employ his money at interest for a number of years.¹

236. What changes were introduced by the Act 1661, c. 32, "concerning heritable and moveable bonds?"

The Act 1661, c. 32, enacted that all contracts and obligations for sums of money, containing a clause of annualrent, shall be held to be moveable, and belong to executors and next of kin, unless they contain an obligation to infeft, or are conceived in favour of heirs and assignees, secluding executors, in either of which cases the statute ordained the sums to be heritable, and to pertain to the heir. But it is declared that bonds with a clause of annualrent shall remain in the same condition as they were before the passing of the Act, *quoad fiscum*, thus exempting them from the operation of the single escheat, and also as respects the rights of husband and wife, so that such bonds are not affected by the *jus mariti* nor by the *jus relictæ*.

237. Enumerate the clauses of the personal bond.

(1) The narrative ; (2) the obligation for the principal sum, penalty and interest ; (3) the consent to registration for preservation and execution ; and (4) the testing clause.

238. What is the meaning of the granter "acknowledging receipt, renouncing the exception of not numerate money, and all other exceptions to the contrary ;" a clause which occurs in the old style of the bond ?

This clause was introduced to exclude the pleas which were competent by the Civil Law, founded on the contract of *mutuum*. The part of the lender under that contract was to deliver the money, and the acknowledgment of receipt of it discharged him of his part of the obligation. The exception of "not numerate money" relates to the case where an acknowledgment is taken without delivering the sum by number or count, which the contract of *mutuum* obliged the lender to do, and accordingly the borrower

¹ Ersk. 2, 2, 9 ; Menzies Lect. 189 (196).

was allowed a certain time to prove the objection, renounced by this clause of *non numerata pecunia*.¹

239. What is the liability of heirs *inter se* for heritable and moveable debts, and the order of liability among heirs in heritage?

A creditor has recourse against all the representatives and property of his debtor(c) and although the heir-at-law is primarily liable for the heritable debts and the executor for those of a personal nature, the creditor has the option of proceeding against the heir or the executor, whether the debt be heritable or moveable, the heir when sued having relief against the executor if the debt is personal, and *vice versa*. But if the creditor proceed against the heirs taking the heritage, they are entitled to the privilege of discussion; and,

(1.) Where in the obligation particular heirs are bound, these are first called.

(2.) Where the debt is made a burden on a particular subject, the heir taking that subject is primarily liable in the obligation.

(3.) Where one part of an obligant's estate is burdened only *subsidiarie*, the representative in that part is entitled to demand the previous discussion of the rest.

(4.) Where the creditor accepts of a corroborative obligation by the heir who is the proper debtor, the other representatives are released.

(5.) Where no such specialties occur, the order of liability among the heirs in heritage is as follows:—

1. The heir general.

2. The heir of conquest. [Heritage and conquest now descend to the same heir.]

3. Heirs of provision, in the following order:—

(1) The heir-male general; (2) the heir of tailie;
(3) the heir of the marriage.²

240. To whom does a bond descend, on the creditor's death intestate, when conceived to him and his heirs, or to

¹ Ross Lect. i. 51, 53; Menzies Lect. 191 (197).

² Stair, 3, 5, 17; Ersk. 3, 8, 52, 53; Bell's Prin. 1935; British Linen Co., 28th May, 1850, 12 D. 949.

(c) Except where the estate is entailed.

his heirs-male, or to the heirs of his body? State the reason.

(1.) A bond conceived to the creditor and his heirs, falls to his executors, because they are *hæredes in mobilibus*, and under the Act 1661.

(2.) When conceived to the creditor and his heirs-male, executors are excluded, because the destination is so qualified as to define a particular class of heirs.

(3.) When conceived to the creditor and the heirs of his body, the bond falls to his executors; because the destination is not such as to exclude the presumption that executors were meant, and so take it out of the Act 1661.¹

241. How may a personal bond be made to operate in favour of the heir-at-law more extensively than his right of succession in heritage?

While heritable securities fall to the creditor's heir-at-law [but see *infra* under Heritable Securities as to change in the law], the arrears of interest due at the creditor's death belong to his executor. But if a personal bond is taken to the creditor, and "his heirs and assignees, secluding executors from the said principal sum and interest thereof," not only does the principal sum fall to the heir, but he is entitled also to the arrears(*d*) of interest, thus operating in his favour more extensively than his(*e*) right of succession in heritage.²

242. Where a person has acquired the right to two bonds, secluding executors, one by service, and the other by assignation to him and his heirs, executors, and assignees; May the bonds be transmitted to his executors by testament?

(1.) The bond acquired by service cannot be carried by testa-

¹ Ersk. 2, 2, 11; Menzies Lect. ² Muir, M. 5524.
194 (200); Duffs, M. 5429.

(*d*) The point as to interest did not arise in the case of Muir referred to. The question was whether a bond secluding executors was heritable or moveable, the creditor having died before the term of payment.

(*e*) More correctly—"his *ordinary* right of succession;" because an heritable bond might be made to produce the same effect.

ment; because, as such bonds are heritable of their own nature, and as service transmits rights precisely as they stood in the person of the deceased, the bond continues heritable in the person of the heir, and is, consequently, incapable of transmission by his testament.¹ [Heritage can now be transmitted by testament.]

(2.) The bond acquired by assignation to the party and his heirs, executors, and assignees, may be transmitted by his testament; because by that new destination the bond has been rendered moveable, and the ordinary course of succession restored.²(f)

243. A person who had lent a sum of money on a personal bond, taken to himself and his heirs, secluding executors, and another sum on a bond in the ordinary terms to himself, and his heirs, executors, and assignees, died intestate before the term of payment of the former bond, but after the term of payment of the latter; How were the rights of his widow and children thereby affected?

(1.) The bond taken to the creditor and his heirs, secluding executors, being heritable *sua natura*, falls exclusively to his eldest son as his heir-at-law, whether he had survived or predeceased the term of payment.

¹ Ersk. 2, 2, 12; Mackay, M. 3224.

² Sandilands, M. 5498.

(f) Suppose a bond secluding executors was conveyed to a party, "and his heirs and assignees," without mentioning executors, will it continue heritable or become moveable in his person? In one case where a husband so conveyed to his wife, who survived him, it was held that their daughter must serve heir to her mother to take up the right; Lockhart, M. 5498. In another case where a father so conveyed to his eldest son, the bond was held to be heritable in his person; Kennedy, M. 5499. But the judges, though unanimous in the decision, were much divided as to the grounds of it; and there were specialties in the case, *inter alia*, that the assignee, being heir, would have succeeded to the bond *ab intestato*, in which case it would have remained heritable in his person. Erskine (2, 2, 12) leans to the opinion that unless the exclusion of executors be repeated in the assignation, the condition will fly off, and the right become personal; but see Ross, 4th July, 1809, F.C., where a majority of the Court held that such bonds were heritable not merely in virtue of the destination contained in them, but *sua natura*, and on this the question depends. In practice the conveyancer should take care not to leave room for doubt as to the destination.

(2.) The bond taken to the creditor and his heirs, executors, and assignees, falls to the creditor's younger children, the widow not being entitled to any portion of it, which in a question with her is accounted heritable, as her husband, the creditor, survived the term of payment.

244. A granted a general obligation to pay the debts of B, and separately to one creditor a bond of corroboration for his principal sum and interest; All the debts of B having ultimately become a burden upon A's succession, how will his widow's claim upon his moveable funds be affected by the different obligations?

The general obligation is moveable, and being therefore payable out of A's personal estate, diminishes the widow's *jus relictæ*. As regards the debt for which A had granted a separate bond of corroboration, if he predeceased the term of payment, it is likewise a burden on the widow's right; but if he survived that term, it does not affect the *jus relictæ*, because it contains a clause of annualrent, and was therefore heritable *quoad* the widow.¹

245. May a bond excluding assignees be assigned?

A bond excluding assignees may be assigned for an onerous consideration, but not gratuitously.²

246. What is the modern use of the penalty in bonds, and how did it come to be fixed at a fifth part more?

The modern use of the penalty is to afford ready execution for the expenses of enforcing the obligation. It is restrictable always to the amount of the expenses incurred in enforcing payment, and it relates only to the common expenses of diligence, and not to the expenses of process. The Act 1672, c. 19, anent adjudications, enacted that the creditor should have as much land adjudged as should be equivalent to his debt and interest, and a fifth part more, because he was obliged to take land for his money; and hence, it is thought, the proportion of a fifth for penalty in personal bonds derived its origin.³

¹ *Ross v. Graham*, 14th Nov. 1816, F.C.

² *Ersk.* 3, 3, 86; and *Ivory's Notes*.

³ *Ersk.* 3, 5, 2; *Boswell*, M. 12578.

247. A having raised actions against his debtors B and C, on their separate personal bonds to him, obtained decree in absence against B, and decree *in foro* against C, the decrees in each case decerning for the principal sum, interest, and penalty, but there was no special decerniture for the expenses of process; What did the decree for the penalty cover in each case?

(1.) The decree in absence for the penalty covered the expenses of process, because they were incurred, not in litigation, but in the steps necessary to enforce payment.

(2.) The decree *in foro* for the penalty covered only the dues of extract, and the expenses of the diligence used upon the decree, but not the expenses of the suit.¹(g)

248. Is a creditor under a bond, who has incurred expenses in maintaining the preference of the security against another creditor, entitled to be ranked for these expenses on the estate of his debtor under the penalty in the bond, the Court having found no expenses due in the litigation?

Yes; because the rule, that expenses of process incurred in discussing points connected with the security are not covered by the penalty, is limited to questions between the debtor and creditor themselves, and does not preclude the creditor from claiming expenses necessarily incurred in defending the right against a third party.²

249. In what cases may principal and interest be accumulated so as to carry interest on the whole?

¹ Gordon, M. 10050.

² Ramsay, 22nd June, 1826, 4 S. 737.(h)

(g) There seems to be no express authority for the distinction taken in this answer. The case of Gordon, cited, supports the statement in branch 2, but not that in branch 1; and it is difficult to reconcile with principle the including in the penalty in the one case and not in the other the expense of proceedings (apart from that occasioned by litigation) which were equally necessary in both. The true ground of the decision in Gordon's case may have been that, the expenses not having been allowed in the former process, the matter was *res judicata*. See Bell's Com. i. 701.

(h) See also Mein, 26th May, 1829, 7 S. 653; and Orr, 20th June, 1839, 1 D. 1046; and Bell's Com. i. 701.

(1.) When a debt has been made the subject of a judicial demand, interest runs on the principal and interest accumulated, as at the date of the demand, the debtor being *in mora* after the demand.(i)

(2.) After denunciation, or after registration of an expired charge,(k) interest is due on the whole sum as accumulated in the diligence.

(3.) In judicial sales the debt and interest are held to be accumulated as at the date of payment of the price.(l)

(4.) The principal and interest are accumulated in adjudications when followed by decree.

(5.) The principal and interest due may be accumulated by a bond of corroboration.

(6.) Accumulation of interest is allowed on bankers' accounts periodically settled, and on writers' accounts of cash transactions settled annually like bankers'.(m)

(7.) Interest is given, by decree of the House of Lords, on the interest included in judicial accumulations.

(8.) A cautioner paying principal and interest is entitled to charge interest upon the accumulated sum.

(9.) Tutors, curators, and factors are bound to accumulate money in their hands annually, so as to carry interest on the accumulation.¹

250. What is the duty of judicial factors under the Pupils Protection Act, with respect to money coming into their hands, and what liabilities do they incur by neglecting that duty?

Under the Pupils Protection Act, judicial factors are required

¹ Bell's Com. i. 353 (i. 696).

(i) See as to accumulation of interest after citation; Maclean, 15th Feb. 1856, 18 D. 609; Donaldson, 3rd March, 1860, 22 D. 937; and in H. of L. (Smith), 20th July, 1864, 2 M.P. 86. In Donaldson, interest was allowed, though not concluded for.

(k) In the register of hornings.

(l) See as to interest on the price in judicial sales; Gordon, 22nd Feb. 1848, 10 D. 751.

(m) See Queensberry's Executors, 23rd May, 1822, 1 S. 428, and 21st Dec. 1826, 5 S. 180.

to lodge money coming into their hands, in a chartered bank,⁽ⁿ⁾ in a separate account or deposit, and if they keep in their hands a larger sum than fifty pounds for more than ten days, they are chargeable with interest at the rate of twenty per cent. on the excess; and, unless the money has been so kept from innocent causes, they are liable to be dismissed from office, and have no claim for commission.¹

251. When the interest on a bond is to be restricted to a lower per centage than the current rate; How ought this to be done, having regard to the interests of the lender?

A clause ought to be inserted in the bond, to the effect that in case the borrower should fail to pay the interest at the reduced rate, within a certain time after each term, interest at five per cent. should be payable by him, and that diligence should pass against him accordingly; or the rate may be stated at five per cent. in the bond, and restricted by a holograph letter by the lender to the borrower, declaring that only the lower rate should be exigible so long as it is regularly paid.^{2(o)}

252. What is the *beneficium divisionis*; and what terms confer it?

The *beneficium divisionis* is a right derived from the civil law, by which any of the obligants is entitled to insist that the whole debt shall not be demanded from him alone, but divided in equal shares among all the parties bound, and each sued for his own share only.³ The right is conferred—(1) at common law, where the parties are bound simply without any express words, as “A, B, and C bind themselves, and their heirs, executors, and successors, to

¹ 12 & 13 Vict. c. 51, § 5.

² Duff's Treatise on Deeds, 16.

³ Ersk. 3, 3, 63; Menzies Lect. 207 (211).

(n) Or in a bank established by Act of Parliament.

(o) The second course here suggested is the preferable one. One objection to the first is, that a bond so framed could not be adapted to a different arrangement, which, in course of time, might come to be desired, particularly if the bond should be assigned; while the second could be made to meet every case.

pay ;”¹ (2) when the parties are bound conjunctly ;²(*p*) (3) where they are bound each for his own share ;³(*r*) (4) where two obligants bind themselves, each along with the other.⁴(*s*)

¹ Ersk. 3, 3, 63 ; Menzies Lect. 207 (211).

² Farquhar, M. 2282.

³ Campbell, M. 14626 ; Duff on Deeds, 22 ; Menzies Lect. 207 (212).

⁴ Alexander, 28th Nov. 1827, F.C. (6 S. 150).

(*p*) This is a point on which there has been some difference of opinion. Professor Menzies laid down the rule as here stated. Professor Napier took the opposite view, and taught that parties bound “conjunctly” are liable *in solidum* equally as when “severally” is added, giving as the authority the case of Sloan, 5th Feb. 1751, M. 14630, where the point was so decided. In reference to that case, Professor Menzies remarks :—“The document here was a letter *inter rusticos*, and it was construed according to the presumed intention of the party.” The document in question referred to a sale of sheep, and bore :—“Delay taking security till I come home, and I shall bind conjunctly with him.” Though writs *inter rusticos* are privileged as to solemnities of execution, it does not seem to follow that words used in them, with nothing in the context to qualify their meaning, should not receive their ordinary construction ; and Lord Elchies, in explaining the ground of the decision, says :—“We unanimously found him liable *in solidum*,” as that is the ordinary acceptance of the term “conjunctly.” The case of Campbell, referred to in note 2, was decided 25th Nov. 1724, so that it was prior in date to the case of Sloan ; and though the obligant was found liable only *pro rata*, it was found relevant to prove by his oath “That it was the intention of the parties, and so understood by him, that he and each of the two obligants should be liable *in solidum* ;” so that perhaps the decision is not quite in point. The question again occurred in M’Kellar, 7th June, 1811, F.C., where it was pleaded that parties bound conjunctly are only liable *pro rata* ;” in support of which, Campbell, *supra*, as also Scott, M. 14638, and Urie, M. 14626, were cited ; while, on the other side, Sloan, *supra*, was relied on. The document in question was a bill, but the judgment was rested not on that, but on the import of the word, and it was remarked on the bench “that the old decisions seemed completely to have reversed the meaning of the word *conjunctly*.” The law, therefore, seems to be, that parties bound conjunctly are liable *in solidum* ; but in correctly framed deeds the expression “conjunctly and severally” is always used.

(*r*) Where parties are bound only “each for his own share,” there is no room for the application of the principle, because by the very terms of the obligation the extent of the parties’ liability is fixed, and independent of each other ; but the peculiarity in Farquhar (cited) was, that the parties had bound themselves, “*conjunctly and severally, to pay the said sum ilk one of them for their own part ;*” and the question was, whether these last words qualified the preceding ones. It was found that they did, and that each party was liable for only one-half of the debt.

(*s*) In the case referred to (Alexander) the obligation was constituted by

253. What is an obligation *in solidum*; and by what terms may it be constituted?

An obligation *in solidum* imports that each obligant is liable for the full amount of the obligation, and that any one of them may be selected by the creditor for payment of the whole, without regard to the solvency or bankruptcy of the other obligants. Such an obligation may be constituted by taking the obligants bound (1) severally; or (2) conjunctly and severally; or (3) as full debtors; or (4) as co-principals and full debtors.¹

254. What obligations imply liability *in solidum*, without the use of terms importing it?

(1) Bills and notes; (2) obligations by co-partners, (*t*) and obligations importing a joint adventure, or a joint purchase, (*u*) or a joint employment; (3) obligations *ad facta præstanda*; and (4) obligations by parties bound for a town or corporation.²

255. Where the obligants in an obligation *ad factum præstandum* are sued for damages for non-performance, Are they liable *in solidum* or *pro rata*?

(1.) Where the obligation is alternative, either to perform the fact or to pay a certain amount of damages, the obligation is divisible, and each obligant is liable only *pro rata*.³ [See, however, M'Laren's Bell's Com. i. 362, note 5.]

(2.) But if the obligation is not alternative, and has resulted in damages by the act of the law, it is indivisible, and each is liable *in solidum*.⁴

¹ Ersk. Prin. 3, 3, 29; Menzies Lect. 205 (211).

² Ersk. 3, 3, 74.

³ Ersk. 3, 3, 74; Bell's Prin. 58 *et seq.*; More's Notes, 118.

⁴ Bell's Prin. 58; Dennistoun, M. 14630.(x)

separate letters, in these terms:—"I hereby become bound to you, along with A B, to guarantee to you to the extent of £800 on account of C D."

(*t*) This might be more accurately expressed—"Obligations competently granted by company firms, which render the partners liable jointly and severally."

(*u*) Professor G. J. Bell (Com. ii. 544) says, joint purchase "is not even a limited partnership," and does not *per se* infer joint and several liability; and it was so found, Neilson, M. 14551. Professor More lays down the rule as in this Answer, and refers to a later case, Mushet, M. 14636.

(x) In this case the parties were found liable only *pro rata*.

256. Where one of several co-obligants pays the amount of the debt, What is the extent of his right of relief against the others?

- (1) He is entitled to relief from the other solvent obligants of their respective shares; but he must communicate the benefit of any deduction or ease obtained on settlement with the creditor.
 (2) When any of the obligants are bankrupt, the loss must be borne by the solvent obligants rateably.¹

257. What peculiar clauses occur in bonds by a tutor for his pupil?

The bond narrates the authority under which the tutor acts, (y) the power to borrow, and the occasion for borrowing, to shew that the money is *in rem versum*; it acknowledges the receipt of the money for the use and behoof of the pupil, and binds the pupil, and sometimes also the tutor, (z) personally in repayment, and it contains an obligation by the tutor to procure a ratification of the bond when the pupil attains majority.²(a)

258. Are trustees personally liable under bonds granted by them *qua* trustees?

Trustees binding themselves *qua* trustees are not, in the general case, personally liable; but by granting a bond or other obligation for a trust debt, they thereby give assurance of being possessed of funds sufficient to meet it, and they are bound to retain those funds to answer the debt, otherwise they will be personally liable.³(b) [See as confirming *Lumsden v. Buchanan*, mentioned in the Note, Muir, 6 R., H. of L. 21.]

¹ Bell's Prin. 62.

² Jur. St. ii. 326.

³ Bell's Com. i. 38; Thomson, 24th June, 1829, 7 S. 787.

(y) If it be a simple personal bond, there is no power but that inherent in the office.

(z) Where the tutor is to be so bound, the narrative should state that he is willing to be so, and he must bind himself personally and individually, and not merely as tutor.

(a) Where the money is borrowed for a minor, the bond narrates that the money is received by the minor with consent of his curators, and binds him, with their consent, to repay.

(b) The doctrine of liability, as here stated, probably goes a little too far. The case of Thomson, cited, was very special. The pursuer held a preferable security by the truster for a debt over part of the trust-estate, which by

259. When a loan is made to a royal burgh, by whom is the bond granted; what peculiar clauses ought it to contain; and do such bonds infer personal liability by the granters?

A bond for behoof of royal burghs is granted by the provost,

arrangement she allowed the trustees to sell, and receive the price, out of which they paid her part of the debt, and granted a promissory-note for the balance, which was left in the hands of one of their number, and lost. It also appeared that they had to some extent paid legacies. Again, signing an obligation may not necessarily imply an assurance that trustees are possessed of funds, as where they borrow money on the security of the trust-estate for trust purposes; and accordingly, they were found not personally liable where they had granted a bond and disposition in security, in which they bound themselves as trustees; Campbell, 6th Feb. 1840, 2 D. 639; aff. 13th June, 1842, 1 Bell's App. 428. Reference may also be made to the recent case of Lumsden's, 26th Feb. 1864, 2 M'P. 695; as reversed in H. of L., 22nd June, 1865, 3 M'P. 89, where trustees were found liable as partners of a joint-stock company, in which they had bought shares. In this case much weight was laid on the terms of the contract of copartnership, and the way in which the trustees had become parties to it; but from the opinions expressed by their Lordships in the Court of Appeal, and by the minority of the judges in the Court of Session, the law may perhaps be stated to be, that where, from the nature of the transaction and the terms of the obligation, it is clear that the parties were, and held themselves out as, acting simply in their fiduciary character, and with reference to the trust-estate and management alone, of which Campbell, *supra*, is an example, they will not be personally liable; but where they deal with matters extrinsic of the trust, and engage in trading or other transactions with parties who are under no obligation, and possibly not in a position to know or ascertain anything about the trust-estate, they will be personally liable; and further, that parties who, though described as trustees, bind themselves and their heirs, &c., in the usual style, will be personally liable. Each case must be judged of from its own circumstances, and the conveyancer's duty is to ascertain what is really intended; and where the case admits of his doing so, to frame the deed so as to prevent all doubt as to the intention, and, as far as possible give effect to it.

There is a distinction in some respects between a bill and a bond by trustees; the presumption raised in the former case is much stronger from its character as a negotiable document, and probably nothing short of an express stipulation to that effect would prevent personal liability for a bill, though granted by a trustee as such.

It may be added, that trustees may incur personal liability without express undertaking, as for expenses found due by them in a litigation, which they cannot plead that they have no funds to meet; Gibson, 25th May, 1838, 11 S. 656. This is on the principle of contract.

bailies, dean of guild, and treasurer, with consent of the other members of the council for themselves, as representing the community. It recites the act of council authorising the loan, and binds the granters and their successors as representing the community. The granters are liable only while they remain in office, and to the extent of the burgh property. But they are personally liable if the bond has been granted without a previous act of council.^{1(c)}

II. CAUTIONARY OBLIGATIONS.

260. What is the *beneficium ordinis*, and what terms confer it?

The *beneficium ordinis* is a right derived from the Civil Law, by which a cautioner is entitled to insist that the creditor shall, before exacting payment from him, discuss or use legal means for recovering the amount from the principal debtor.² To confer the *beneficium ordinis*, it is now not enough that the surety be bound as express cautioner, but there must be a special stipulation in the deed that the creditor, before proceeding against the cautioner, shall be bound to discuss the principal debtor.³

261. What is a sufficient discussion of the principal debtor?

(1) Denunciation of debtor on letters of horning, or, under the Personal Diligence Act, registration of an expired charge; (2) poinding, or arrestment, and forthcoming of his moveables; and (3) adjudication of his heritable estate.⁴

¹ Menzies Lect. 203 (209); Jur. St. ii. 371.

² Ersk. 3, 3, 61.

³ 19 & 20 Vict. c. 60, § 8.

⁴ Bell's Prin. 253.

(c) Sometimes bonds are granted by a factor for his constituent, for which purpose special authority by deed must be given. The bond narrates this power, and binds the constituent to repay. A question has been started whether in this case it would be safe to use personal diligence against the constituent; and it has been suggested that all doubt might be removed by introducing into the factory a clause consenting to the registration of the factor's bonds, for the purpose of authorising personal diligence against the constituent. It is believed this would answer the purpose.

262. In what circumstances is the demand for discussion precluded, notwithstanding an express stipulation for discussion in the bond?

It is a sufficient answer to the demand for discussion, (1) that the debtor is bankrupt, and his estates sequestrated;¹ or (2) that he is forth of the kingdom, and has left no effects.^{2(e)}

263. In what obligations granted before the passing of the Mercantile Law Amendment Act is discussion excluded?

(1.) In obligations in which the principal and cautioner are bound severally, or conjunctly and severally, or as co-principals, or the cautioner as full debtor for and with the principal.

(2.) In bills and notes.

(3.) In judicial bonds of caution.³

(4.) In guarantees for payment of a debt within a certain time.⁴

264. Where the bond contains an express stipulation for discussion, may the creditor proceed against the cautioner before discussing the principal debtor?

The creditor must first discuss the principal debtor before exacting payment from the cautioner; but the latter may be sued in the same action with the principal debtor, provided execution against the cautioner be superseded till the principal is discussed.⁵

265. Is the granter of a bond, dated before 1856, to see rents

¹ Buchanan, 4th March, 1831, 9 S. 557.

² Elams, M. 2110.

³ Bell's Prin. 253; Duff on Deeds, 26.

⁴ Blackwood, 10th March, 1848.(f)

⁵ Macdonell, 7th July, 1829, 7 S. 845.

(e) In neither of the cases here referred to (notes 1 and 2) was there any stipulation for discussion; but, as has been mentioned (Ans. 260), the law was then different. In Wishart, H. of L., 12th May, 1837, 2 S. & M'L. 564, it was held, reversing judgment of Court of Session, 16th May, 1835, 13 S. 769, that a cautioner was entitled to discussion of the deceased principal debtor's estate.

(f) In Blackwood's case, 10 D. 920, nothing seems to have turned on the question of time. The ground of the decision was, that the obligation constituted a direct guarantee, as distinguished from a cautionary obligation.

paid during the currency of a lease, entitled to the benefit of discussion? State the reason.

The granter of a bond is not entitled to the benefit of discussion; because it is not properly a cautionary obligation, but a continuing guarantee to see a debt paid within a certain time.¹(g)

266. Where A, as taking burden for B, binds him to pay a sum of money, is A liable on B's failure, A having power to bind?

A is not liable on B's failure, as the obligation is only a guarantee of A's power to bind B. If A, as taking burden for B, had bound *himself*, he would have been liable, for in that case there would have been a primary personal guarantee on A to fulfil the obligation.²

267. Is a cautioner, *ad factum præstandum* entitled to demand the discussion of the principal obligant, when there is no stipulation to that effect in the bond?

Yes; because the principal alone can perform the fact for which the obligation is granted, and all that the cautioner can do is to indemnify the creditor for the loss occasioned by the failure of the principal;³ and the Mercantile Law Amendment Act refers only to obligations for the payment of debt.

268. Where the bond has been executed by the cautioner, is it binding on him if the principal debtor has not subscribed, or if the subscription of the latter has not been legally attested? State the reasons.

(1.) Where the bond has not been signed by the principal debtor, it is not binding on the cautioner though subscribed by

¹ Grant, 22nd Feb. 1853; 15 D. 424.

² Mollison's Trs., 11th June, 1851, 13 D. 1075.

³ Ersk. 3, 3, 62.

(g) Opinions to the effect here stated were expressed, but the point was not properly decided nor raised. The principal had been discussed, and the question was as to the cautioner's liability for the expense attending it, the creditor's claim for which was repelled.

him because cautionry is an accessory obligation, which cannot take effect if there be no principal obligation.(i)

(2.) But it is stated by Erskine, that where the principal debtor has signed, although his signature be not legally attested, the obligation will be binding on the cautioner ;(k) because a cautioner may be more strictly obliged than the proper debtor.¹

269. What is the *jus cedendarum actionum*; and what is the extent of the right?

The *jus cedendarum actionum* is the right competent to a cautioner, on payment of the debt, to demand from the creditor an assignation of the debt and diligence, and all the securities held by him for the debt.² But he is not entitled to an assignation to a security held by the creditor for another debt as well as for the debt paid by him.³(l)

270. A is cautioner for £2000 in a bond and disposition in security by B to C. B grants a second security for £1000 to C upon the same subjects, which are sold for £1500; What is A's liability?

A is liable for £500 only; because where a creditor makes a second loan to the debtor upon the same security, he is bound to

¹ Ersk. 3, 3, 64.

² Ersk. 3, 3, 68.

³ Ersk. 3, 5, 11.

(i) — v. Crighton, M. 2074.

(k) The reason alleged by Erskine in the passage referred to is,—“for a cautionary obligation may be effectually interposed to an obligation merely natural.”

See as to bonds in name of several obligants, but not signed by all of them, *infra*, Ans. 287 and notes.

A party who was having certain tenements erected for him, granted to the builder an obligation to pay six instalments of £100 each at certain stages of the work, “and the balance when the work is completed.” The architect appended thereto an agreement “to see you paid the above instalments.” Held that this did not import an obligation by the architect to pay the balance; Rennie, 23rd March, 1866, 4 M’P. 669.

(l) He would be entitled to an assignation to any surplus or balance of the security after paying the other debt; and might, on payment of that debt, demand an assignation to the whole security; Ersk. 3, 5, 11. A cautioner for rent is on payment entitled to an assignation to the landlord's right of hypothec; Stewart, 31st May, 1814, F.C.

rank the first bond in its natural order, and is not entitled to prejudice the cautioner's relief by postponing it to the subsequent bond, so as to draw payment of the last out of the subjects, and throw the burden of the first upon the cautioner.¹

271. When a cautioner, bound conjunctly and severally with the principal debtor and the other cautioners, pays the debt, what is the object of taking an assignation from the creditor ; and is it absolutely necessary for his relief ?

When a cautioner pays the debt, he may, without obtaining an assignation, sue for proportional relief against the rest, so that the loss shall fall on all the solvent obligants equally.^(m) But when he has got a conveyance from the creditor, he is thereby in his right, and is entitled to proceed by summary diligence against any one of the co-obligants for the whole, under deduction of his own share and his proportion of the shares of the insolvent cautioners, leaving to the cautioner sued his action of relief against the others.²⁽ⁿ⁾ Further, without a special conveyance the cau-

¹ Sligo, 18th July, 1840, 2 D. 1478; ² Ersk. 3, 3, 74; Bell's Com. i. sec Scott, 15th Mar. 1859, 21 D. 737. 372).

(m) Macghies' Crs., 18th Nov. 1785, M. 14668.

(n) The doctrine here stated, though it is laid down by Erskine, and borne out by Smeiton, March, 1684, M. 14641, appears to be erroneous. It does not seem to be alluded to by Mr. Bell, and is hardly consistent ; because, while the cautioner assignee is said to be in the creditor's right, it is admitted that he must deduct not only his own share, but his proportion of the insolvent cautioners' shares of the debt, which the creditor is not bound to do. Besides, in the case supposed, the co-obligant, by taking an assignation from the first, would on the same principle become entitled to turn round and demand repetition of his over-payment. It seems more correct in principle, as well as more equitable, to hold that, in a question between the co-obligants themselves, each of them is debtor only in his due proportion of the debt, and that this proportion cannot be increased, directly or indirectly, by any operation of the creditor or of the co-obligants. This plea was, after Erskine's time, maintained, and though overruled in the Court of Session, received effect in the House of Lords in Maxwell's Crs., 8th Feb. 1792, H. of L., 11th June, 1794, M. 2136. In this case the co-obligant had taken an assignation to trustees for his behoof.

One effect of taking an assignation should be kept in view—viz., that if

tioner cannot plead upon the separate securities held by the creditor, and to which the cautioner has right.¹

272. Where the creditor has discharged the principal debtor, or one of the cautioners, has he recourse against the other cautioners ?

(1.) Where the creditor has discharged the *principal debtor*, he has no recourse, because he cannot transfer his right of action against him.²(*o*) But it is otherwise (1) where the cautioners have consented to the discharge;³ or (2) where the creditor has expressly stipulated in the discharge that it shall have no effect if the cautioners are to be thereby liberated;⁴ or (3) where the principal debtor has been discharged, with the consent of the creditor, in a sequestration of his estates.⁵

(2.) Where one of the cautioners has been discharged, and the obligation is dated after the passing of the Mercantile Law Amendment Act, the other cautioners will be released in all cases except where they consent to the discharge, or where it has been granted in a sequestration.⁶(*p*) [See Morgan, 10 M.P. 610, where it was held that the provision of the Act applies only to joint and several obligations.]

273. What is the *actio mandati*, and when does it arise ?

The *actio mandati* is that by which a cautioner effectuates his relief against the principal debtor ; and it arises (1) on distress ;

¹ Ersk. 3, 3, 68.

⁴ Smith, 22nd Nov. 1821, 1 S. 159.

² Wallace, 13th Jan. 1825, 3 S. 438.

⁵ 19 & 20 Vict. c. 79, § 56.

³ Fleming, 24th May, 1823, 2 S. 336.

⁶ 19 & 20 Vict. c. 60, § 9.

the assignee should be a party to any transaction favourable to the debtor, to which his co-cautioners are not parties, he will lose his right of relief. Thus, where he indulged the debtor with a prolongation of the term of payment, and parted with a security, his relief was lost ; Hume, 12th Jan. 1830, 8 S. 295.

(*o*) The opposite of this had been found in 1680 ; Leitch, M. 2076.

(*p*) The words of the Act are, "a co-cautioner who may have become bankrupt," so that sequestration, though the best evidence of the fact, may not be absolutely essential.

(2) on payment ; (3) before payment or distress, where the debt remains unpaid after the term of payment, *(r)* or where the cautioner's obligation is prospective and indefinite, as for the performance of an office. Where the debtor is *vergens ad inopiam*, the cautioner may sue for security before the term of payment.¹

274. In what cases has a cautioner no relief ?

A cautioner has no relief (1) if he pay a debt not justly due, or extinguished by prescription ;² (2) where the debt has been contracted for the benefit of the cautioner ;³ (3) where he has become liable to pay *ex delicto* ;⁴ *(s)* (4) he has no immediate relief where he pays the debt before it is due ;⁵ (5) where the principal debtor's obligation is merely natural, the cautioner's relief is restricted to what is *in rem versum* of the debtor.⁶

275. Where one of two cautioners, bound jointly and severally for £1000, paid the whole debt, and the other became bankrupt ; For what sum is the former entitled to be ranked on the estate of the latter ; and on what principle ?

The cautioner who paid the debt is entitled to be ranked on the insolvent cautioner's estate only for £500, being the half of the debt ; on the principle that, although the cautioners are bound *in solidum* to the creditor, each is liable, *inter se*, only for a rateable share ; and where a cautioner pays the whole debt, his half

¹ Ersk. 3, 3, 65.

² Maxwell, M. 2115.

³ Erskine, 5th July, 1842, 4 D. 1478.

⁴ Ersk. 3, 3, 70.

⁵ Owen, 26th Nov. 1833, 12 S. 130.

⁶ Ersk. 3, 3, 67.

(r) Erskine makes the right in this case conditional on the debtor having been "taken expressly obliged to deliver to the cautioner his obligation cancelled at the same term at which he hath bound himself to make payment to the creditor, for upon that alternative the cautioner may sue the debtor if he fail to perform as effectually as the creditor himself can do."

(s) This applies to relief, not between cautioner and principal, but between persons who *ex quasi delicto* have become liable *subsidiarie* for the debt and proper cautioners, as where magistrates have allowed a debtor to escape, or the granter of a bond of presentation has failed to present the debtor in terms of his obligation.

being necessarily extinguished, it is only the other half which he pays in the character of surety for his co-cautioner that he can claim against his estate.¹

276. Where one of three cautioners bound jointly and severally for £900, has paid the whole debt, and another is bankrupt, what is the extent of his relief against the solvent cautioner?

The cautioner who has paid the debt is entitled to relief from the solvent cautioner of £450, being the amount of his own share, and the half of the share of the insolvent cautioner.^{2(t)}

277. The whole debt being ranked upon the estate of one of two cautioners, and a composition of 12s. 6d. in the pound paid, Has that estate a claim of relief against the other obligant?

If the creditor, having gone first against the estate of the insolvent cautioner, has received a dividend from his estate of 12s. 6d. in the pound, that estate is entitled to relief from the solvent cautioner to the extent of 2s. 6d. per pound, being the excess above the half of the debt which the bankrupt cautioner must have paid had he continued solvent.³

278. Where one cautioner obtains a separate security for his relief, is he bound to communicate it to the others? State the reasons.

(1) Where the separate security has been given by the debtor, the cautioner is bound to communicate it rateably to the others; on the principle, that in obtaining the security, he is held to have acted as *negotiorum gestor* for the benefit of the whole obligants; (2) unless it has been given 'with the knowledge of the other cautioners at the time when the bond was granted, in which case, Professor G. J. Bell says, "it is probable that the Court would not communicate the security;"^{4(u)} (3) the cautioner is not bound

¹ Bell's Com. i. 371).

² Bell's Com. i. 373).

³ Bell's Com. i. 371).

⁴ Bell's Com. i. 367).

(t) And each is entitled to rank for £150 on the bankrupt cautioner's estate.

(u) The principle here stated was adopted in Murray, 26th June, 1832, 10 S. 706; but there was this specialty in the case, that the security consisted of

to communicate the security when it has been obtained from a stranger, because the debtor's estate, which is primarily liable for the obligation, is not thereby diminished ;¹(x) (4) nor, it has been held, where the other cautioners are bound for separate and different sums, as they are not in that case held to be *correi*,² but this rule has been disputed by Professor G. J. Bell,³ and also by Professor Menzies ;⁴ (5) where a cautioner who holds a collateral security is creditor in other debts, he is not bound to renounce the benefit of his security.⁵(y)

¹ Coventry, 16th June, 1830, 8 S., 924.

² Bell's Com. i. 367).

⁴ Menzies Lect. 214 (221).

³ Lawrie, 6th June, 1823, 2 S. 368.

⁵ Lennox, 18th May, 1815, F.C.

a claim for meliorations due by one of the cautioners to the principal debtor, under a lease entered into between them at the same time that the cash-credit bond was granted, and which stipulated "that the obligation for these meliorations shall not take place until the landlord" (cautioner) "is fully relieved" of any sum which he might pay under the bond ; in consequence of which, it was thought that till he was so relieved no claim for meliorations could arise.

(x) The doctrine here stated is also laid down by Professor Bell (Com. i. 368), but did not form the ground of judgment, and indeed was not the question at issue in the case of Coventry, in which the circumstances were, that at the time of signing the bond, Moffat, one of the cautioners, got from Hutchison a letter referring to both Moffat and Coventry as parties to the bond, but addressed to Moffat alone, and agreeing not only to become bound in the third share of the responsibility of the bond, but to relieve him of all loss under it. Moffat having died, his trustees paid up the bond, and got repayment of one-half from Hutchison, and of the other from Coventry, who two years thereafter took from Moffat's trustees an assignation to the bond, and sued Hutchison for the difference between one-half and one-third, on the ground that the letter had been granted for his, Coventry's, behoof as well as for Moffat's. There was therefore no question as to Moffat's obligation to communicate the security, but an attempt to show that Hutchison had become joint obligant with the other two.

(y) The case of Lennox, cited, relates to an entirely different matter (see *infra*, note under Ana. 299). The point here referred to was ruled in the opposite way to what is here stated ; Milligan, 20th May, 1802, M. 2140, and "Cautioner," App. 2. Here Milligan and Glen were cautioners to a bank for Mouncie, who, having got into difficulties, granted Glen a security for a debt already due, and in relief of the bond. Glen sold the subject, and paid half the debt to the bank, and exhausted the balance of the price in paying the debt due to himself. Milligan paid the other half to the bank, and sued Glen for relief of one-half thereof. Glen pleaded, no funds of Mouncie's remaining ; but he was found liable, as being bound to communicate the benefit to his security.

279. Is the cautioner discharged by the creditor liberating the debtor after incarceration, or after apprehension? State the reasons.

(1) The cautioner is discharged by the creditor liberating the debtor after incarceration, because he thereby "loses that chance of recovering payment which arises from the *squalor carceris*." (2) But he is not discharged if the debtor has been apprehended only; because, although a creditor cannot pass from consummate diligence without releasing the cautioner, he may begin diligence without being compelled to finish it.¹ The former point, however, is doubted by Professor G. J. Bell.² [The provisions of the Debtors' (Scotland) Act, 1880, abolishing apprehension or imprisonment for civil debt (except in certain specified cases), will be kept in view.]

280. In what case is a cautioner freed by delay allowed to the debtor.

The cautioner is not freed by mere inactivity on the part of the creditor in enforcing payment; but he will be freed by the creditor agreeing to give time, by virtue of positive contract between him and the principal, and without the consent of the surety.³(a) [Bowe, 6 M'P. 642.]

281. May a cautioner in a bond for a sum of money, or in a cash-credit, or for a judicial factor, or for a tenant in a lease, recall his responsibility?

(1.) A cautioner for an absolute obligation, as a bond for a sum of money, cannot withdraw his security.

(2.) A cautioner in a cash-credit may stop further advances on his responsibility by giving notice to the bank.

¹ Ersk. 3, 3, 66; Menzies Lect. 210 (217); M'Millan, M. 3390.

² Bell's Prin. 265.

³ Mactaggart, 16th April, 1835, 1 S. & M. Ap. 553; (z) Morrison, 16th Feb. 1849, 11 D. 653.

(z) Reversing 24th Jan. 1834, 12 S. 332.

(a) The question in Mactaggart's case was not as to giving time, but whether a cautioner for a trustee in a sequestration, who was sued for funds misapplied, was relieved of his obligation by alleged remissness and failure in duty on the part of the commissioners and creditors, which had enabled the trustee to commit the fraud; and which plea was in House of Lords repelled. The case of Morrison is in point.

(3.) A cautioner for a judicial factor may withdraw on reasonable notice.

(4) A cautioner for a tenant cannot recall his responsibility.¹

III. SEPTENNIAL LIMITATION OF CAUTIONARY OBLIGATIONS.

282. What requisites are prescribed by the Act 1695, c. 5, for giving cautioners the benefit of it?

The requisites prescribed by the Act are:—(1) the party pleading it must be bound as express cautioner, or as principal, or co-principal, provided he has a clause of relief in the bond, or a separate bond of relief intimated personally to the creditor at his receiving the bond ;(b) (2) whether as cautioner, or as an ordinary co-obligant, he must be bound conjunctly and severally ; (3) the bond must be for a sum of money.

283. What classes of obligations do not fall within the operation of the Act ; and for what reasons?

(1.) Bonds and contracts in which the term of payment expressed in the obligation is beyond seven years from its date ; because diligence cannot proceed within the statutory period.²

(2.) Cautionary obligations in marriage-contracts ; on account of the uncertainty of the term of payment, or of their being prospective.³ But where the term of payment is certain, and the obligation is consistent with the other requisites of the Act, the limitation, it is thought, would apply.⁴

(3.) Obligations for the payment of an annuity, or the interest upon a loan, and cash-credit bonds ; because they are prospective.⁵

(4.) Bonds of corroboration, bonds of relief by one cautioner to

¹ Bell's Prin. 266.

² Ersk. 3, 7, 23.

³ Bell's Prin. 602.

⁴ Duff on Deeds, 32.

⁵ Duff on Deeds, 31 ; Alexander, 23rd Dec. 1843, 6 D. 322 ; Balvaird, M. 11005.

(b) It was held that the creditor's personal knowledge is not sufficient, but that there must be intimation by way of instrument under the hand of a notary at the time of signing or delivering the bond ; Bell, 14th Feb. 1727, M. 11039 ; but in a prior case it was found that the creditor's both writing and being a witness to the bond of relief, which was of the same date with the principal obligation, was equivalent to intimation ; M'Rankin, 24th Feb. 1714, M. 11034.

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another, and mercantile or other guarantees ; because the granters are not bound in conformity with the requisites of the statute.¹

(5.) Obligations *ad facta præstanda*, (c) bonds of caution for the faithful discharge of an office, and judicial bonds ; because the statute applies only to bonds for sums of money.²

(6.) Obligations for a composition in bankruptcy ; because the granters engage to pay when the debts shall be ascertained, which is an indefinite term.³

(7.) Obligations for mutual relief ; because the statute applies only to bonds in which one or more of the obligants have full relief against another, as principal debtor.⁴

(8.) Bonds executed in a foreign country ; because the Act operates as a qualification of the contract *ab initio*, limiting the obligation on the cautioners to seven years, and consequently the statute cannot be applied to a contract entered into in a country to which it does not extend.⁵

284. How may the septennial limitation be excluded, in a bond by a principal and cautioner ; and would a renunciation of it by the cautioner be effectual ?

The operation of the limitation may be excluded, (1) by taking the cautioner bound as principal without a clause of relief in the bond, or allowing him to intimate a separate obligation of relief at the date of delivery of the bond ; (2) by taking the surety bound as express cautioner, but without binding him conjunctly and severally with the principal, which would exclude the limitation without giving the cautioner the benefit of discussion.⁶(e) It has

¹ Bell's Com. i. 375.

⁴ Ersk. 3, 7, 23.

² Bell's Com. *ib.*

⁵ Alexander, 23rd Dec. 1843, 6 D.

³ Cuthbertson, 23rd May, 1823, 2 S. 291.

⁶ 19 & 20 Vict. c. 60, § 8.

(c) In a bond of presentation the cautioner bound himself that the debtor should not only present himself, but pay the debt, &c. Held that this obligation, in respect of the pecuniary element involved in it, fell under the Act ; *Monro, M. 11017*. See also Bell's Com. i. 375, note 1.

(e) The method here proposed for excluding the septennial limitation is ingenious, but it is thought not sound. It proceeds upon the assumption that the proviso in the Act 1695, "that he have either clause of relief in the bond, or a bond of relief, apart," applies to all the persons falling under the descriptions of those who are to be understood as cautioners. This is probably consistent with the strictly grammatical construction of the words of

been held that the benefit of the limitation cannot be renounced by

the Act, which are, "that whoever is bound for another, either as express cautioner, or as principal, or co-principal, shall be understood to be a cautioner, and have the benefit of this Act, providing that he have either clause of relief in the bond or a bond of relief," &c.; but it is to be kept in view that the object of the Act was to regulate matters, not as between the principal and the cautioner, but between the cautioner and the creditor, and to put the creditor on his guard by making him aware that he was dealing with a cautioner, for which purpose nothing could be more effectual than a declaration on the face of the deed that he was such. This accordingly seems to have been the construction put upon the Act by the Court. Thus, in *Ross*, M. 11014, it was held that where two persons were bound conjunctly and severally, the one as principal, the other as cautioner, the cautioner was entitled to the benefit of the Act, though there was neither clause of relief in the bond nor separate bond of relief intimated. In another case, *Douglas, Heron, & Co.*, M. 11032, the same judgment was given, and the report bears "that as by the bond in question the petitioner's (defender's) father was bound expressly as cautioner, there was no necessity for a clause of relief in the bond, or a separate bond of relief intimated," &c. The question again occurred in *Yuille*, 27th Nov. 1827, 6 S. 137, with the same result. In this case the bond proceeded thus:—"Therefore we, as principals, and with and for us George Yuille, &c., as cautioners, sureties, and full debtors, bind and oblige us, jointly and severally," &c. In the pleadings an extract is given from Baron Hume's Lectures, in which, with reference to the *proviso* in the Act, he stated,— "This is plainly intended to apply to the case of those who do not bind as cautioners expressly on the face of the bond, but as co-principals. Where, then, the party binds openly and on the face of the bond as cautioner, there is no necessity for the statutory qualification of a clause or bond of relief." In delivering his opinion, the Lord Justice-Clerk (Boyle) stated,— "It is impossible to say that this statute is very accurate in its terms." "The necessity pressed on us as to the *proviso* of a clause or bond of relief being applied to both characters, arises from looseness in framing the clause; but I have no doubt that it was intended to be applied to the immediately preceding individual mentioned—viz., the principal or co-principal. In the clause 'provided he have either clause of relief,' &c., the word 'he' applies to the principal or co-principal, and that without any undue stretch of language. If a party binds as express cautioner, it requires no other explanation; but if he binds as principal or co-principal, it requires an authentic indication of his character." Lord Glenlee stated—"All this clause says is, it is of no consequence whether you are cautioner or co-principal, if you have a clause or bond of relief, but in effect the express cautioner is in the same situation as a principal having a clause of relief." And Lord Alloway—"I have no doubt but that the object of the statute was to enable the creditor to know the character of the party." Looking to the authorities now referred to, it seems impossible to suppose that a party appearing expressly as cautioner would not be entitled to the benefit of the Act.

the cautioner ;¹ but in a later case doubts were entertained of this doctrine in the House of Lords.²(*f*)

285. What is the effect, as regards the limitation, of a payment of interest by the cautioner after the expiration of the seven years, or of giving him a charge on the bond during the seven years ?

(1.) A payment of interest after the seven years has no effect in perpetuating the obligation ; because the limitation operates as a total extinction of it, and as such a payment is presumed to have been made in error, the cautioner was found, in one case, entitled to repetition.³(*g*)

(2.) A charge on the bond has the effect of prolonging the obligation against the cautioner for the principal sum, with such interest as shall have fallen due within the seven years.⁴(*h*)

IV. BOND OF CREDIT, ETC.

286. What are the general characteristics of the cash-credit bond ?

The form of the bond is an obligation by the parties as co-principals, jointly and severally, the principal being distinguished as the person in whose name the account is to be kept. The obligation is for a certain definite sum, or such parts thereof as should be drawn out or given value for by drafts, bills, &c., with interest from the date of advance ; and it contains a declaration that the balance at any time due shall be ascertained, and consti-

¹ Norrie, M. 11013 ; Ersk. 3, 7, 22.

³ Carrick, M. 2931.

² Douglas, Heron, & Co., 2nd April, 1800 ; 4 Paton's App. 133.

⁴ Bell's Prin. 603.

(*f*) It was expressly decided by the Court of Session, in a case prior to Douglas, Heron, & Co., that the benefit of the limitation may be renounced, and that the words of the Act "are only to be understood of the obligation he came under by the bond itself ; but that he may, by writ or promise referring to the said cautionary obligation, become bound simply ;" and this was said to be "now of a long time a settled point ;" Wallace, 13th July, 1749, M. 11026.

(*g*) In Carrick's case, cited, repayment was demanded the following day—the presumption is in favour of error, "and not donation, unless the contrary can be proved." See also Yuille, 9th Feb. 1830, 8 S. 485.

(*h*) See Bell's Com. i. 376 ; correcting Ersk. 3, 7, 24.

tuted by an account from the books of the bank, certified by the cashier, which shall warrant summary diligence.¹

287. Is a cash-credit bond, in name of several obligants, but not subscribed by the whole of them, effectual against the subscribers?

(1.) Where none of the obligants named in the bond are truly cautioners, and the obligation is joint and several, it will be effectual, it is thought, against the subscribers; because they are bound *in solidum*, and they ought not to have allowed delivery of the deed until it was subscribed by the whole.²⁽ⁱ⁾

(2.) But if some of the subscribers, though bound as co-principals, are truly cautioners, the bond will not be effectual against them, because a party is entitled to the equities of a cautioner wherever it appears^(k) that he is such, though bound as a principal, and in cautionry it is an implied condition of the obligation of each cautioner that the whole shall be bound.³

288. If a cash-credit bond were subscribed by a company firm, or by a company firm and the partners, what would be the effect of the obligation, in either case, against the company and against the partners, the credit being granted for behoof of the company, or for behoof of a third party?

(1.) If the credit was *for behoof of the company*, the subscription

¹ Jur. St. ii. 381.

² Menzies Lect. 221 (228).

³ Paterson, 9th March, 1844, 6 D.

987.

(i) In the case of Paterson, *infra*, note 3, Lord Fullerton expressed a somewhat different view, observing—"Even if they were joint and several principal obligants, I think that in strict law the bank would be in as bad a position. For what in that view is the nature of the obligation? It is a credit by the bank to four persons, the money to be drawn in name of one of them. That being the true view of the case, according to the conception of the bank, can anything be more plain than this, that a mandate by four only executed by three is no mandate at all." In a recent case, where a bond for borrowed money, bearing to be granted by A, B, and C, as principal obligants, was signed and delivered by B and C, A being present at the execution of the deed, but refusing to sign it, it was held that B was not afterwards entitled to repudiate the obligation on the ground that A had not signed the deed; Craig (in Montgomery, &c.), 13th Dec. 1865, 4 M'P. 192.

(k) The rubric in Paterson's case (note 3) bears, "wherever it appears clearly from the transaction, as set forth in the deed, that he is such."

of the firm binds the company and the whole partners, and the signature of the partners obliges them as individuals without express words to that effect.¹

(2.) If the credit was *for behoof of a third party*, the subscription of the firm, it is said, does not bind the company, or the partners who did not authorise it, because cautionary obligations are not in the line of a company's business.² If the bond were subscribed by the firm, and also by the partners, the individual partners of the company would not be liable each in a separate share, but together only in one single share, as their subscription would be held to have been added merely to give effect to that of the company.

289. What is the effect, with regard to cautioners, of a change in the partnership of the company to whom the credit is granted, or a change in the proprietary of the bank?

(1.) A change in the partnership will relieve the cautioners, because the company is dissolved by the change, and because those on whose discretion the cautioners relied may have been removed.³ But the obligation will subsist where the intention of the parties that it should continue binding, notwithstanding the change, "shall appear either by express stipulation, or by necessary implication from the nature of the firm or otherwise."⁴

(2.) A change in the proprietary of the bank will not affect the obligation of the cautioners, as their intention to continue bound appears by necessary implication from the nature of banking companies.

290. What is the effect of a stipulation in a bond of credit that a charge thereon for the balance, as ascertained by the certified account, shall not be suspended, except on consignment? State the reason.

The stipulation is not effectual; because it would interfere with the principles of public law, and by preventing Courts from suspending on caution, would stop the course of justice.⁵

291. Is the heir of a co-obligant in a cash-credit liable for drafts after his ancestor's death, where no notice had

¹ Melliss, 22nd June, 1815 F.C.

² Bell's Com. i. 288 (i. 370).

³ Christie, 19th Jan. 1826, 4 S.
368.

⁴ 19 & 20 Vict. c. 60, § 7.

⁵ Forrester, 27th June, 1815, F.C.

been given by the bank to the obligant's heir of the existence of the bond?

The heir is liable, not only for the debt as it stood at his ancestor's death, but for subsequent drafts until recall of his responsibility; and it is not the duty of the bank to give notice to the heir of the existence of the bond.¹

292. Is a cautioner, interposed in a cash-credit already granted, liable for sums advanced before the date of his bond?

Yes; provided there has been a fair disclosure of the state of the accounts.²

293. When an annuitant dies between terms, have his representatives any claim, the annuity being declared payable all the days of his life?

It was formerly held that upon the death of the annuitant between terms the annuity ceased as at the term preceding his death, because it was due in indivisible termly payments; but under the Apportionment Act, the representatives of the annuitant are now entitled to a portion of the annuity for the period from the last term till his death.³(*m*) [See the Apportionment Act, 1870.]

¹ Commercial Bank of Aberdeen, 4th Feb. 1801; Hume 88; Paterson, 5th July, 1808, F.C.; British Linen Co., 12th Feb. 1858, 20 D. 557. See Wyllie, 13th Dec. 1853, 16 D. 180.

² Bell's Prin. 301.
³ 4 & 5 Will IV. c. 22, § 2; Bridges, 7th March, 1844, 6 D. 968, affd. (*l*)

(*l*) 23rd Feb. 1847, 6 Bell 1.

(*m*) This Act has been found, though it is believed not originally intended (see observation by Lord Jeffrey, who was Lord Advocate at the time of its passing, in Bridges, *supra*, 6 D. 980) to apply to Scotland. It is understood, however, not to apply in all cases, such as the division of house rents, the rule regarding which, at common law, is more favourable to executors. The point here referred to has not been decided, and as, at common law, annuities terminate at the term preceding death (see Dalhousie, M. 15915, and Colebrooke, 13 S. 756), and the object of the Act is stated to be to apportion termly payments, not to increase the obligations of the debtors in them, its effect in this respect may perhaps be doubted. Annuities due under policies are (§ 8) specially excepted, which may seem to favour the view stated in the text, though the ground of distinction between them and other annuities, if such was intended, is not very clear; but the words of the preceding section tend to the opposite

When the annuity was declared to be alimentary, it was always held to be payable forehand, and to vest *de die in diem*.(n)

294. Whether is a bond of annuity a burden on the granter's heir or his executor ?

(1.) If the annuity is irredeemable, it is a burden on the heir, because it is heritable, having a tract of future time, and yielding a yearly profit without relation to any capital sum. If the executor is called on to pay, he will be entitled to relief from the heir.

(2.) If the annuity is redeemable, it is a burden on the party entitled to redeem.(o).

295. What is the object of a bond of relief, and what are its operative clauses ? State the reasons.

The object of a bond of relief is to enable the cautioner to enforce his relief against the principal debtor, by summary diligence, and before payment or distress. The operative clauses of the deed, besides the obligation to relieve, are, (1) an obligation

conclusion. By that section it is enacted that all rents, annuities, &c., "shall be apportioned so and in such manner that on the death of any person interested" therein, "he or she, and his or her executors," &c., "shall be entitled to a proportion of such rents, annuities," &c., "according to the time which shall have elapsed from the commencement or last period of payment thereof," &c., "and that every such person, his or her executors," &c., "shall have such and the same remedies at law and in equity for recovering such apportioned parts of the said rents, annuities, &c., "when the entire portion of which such apportioned parts shall form part, shall become due and payable, and not before, as he, she, or they would have had for recovering and obtaining such entire rents, annuities," &c., "if entitled thereto ;" but as no "entire portion" of the annuity would ever "become due and payable," the time for recovering the "apportioned part" would never arrive. On the whole, the true object, whatever may have been the effect of the Act, seems to have been, not to create new obligations, but to regulate the rights of heir and executor in payments, which were to continue, notwithstanding the death of the parties for the time in right of them.

(n) There seems to be some mistake here. Annuities payable forehand could hardly vest *de die in diem* ; because, being paid termly, each payment would extinguish the claim till the next term, when another term's payment in advance would be due.

(o) All annuities are, in case of intestate succession, burdens on the heir ; it must therefore be here assumed that there is a settlement laying the burden on some one else.

to make payment of the debt to the creditor at the term of payment and to deliver to the cautioner the bond discharged ; (2) *or otherwise*, and in the option of the cautioner, to make payment to the cautioner himself at the term of payment, of the principal sum, interest and penalty, so that he may make payment to the creditor, and thereby operate his own relief. Without both of these clauses the cautioner could not, in the ordinary case, enforce his relief till payment or distress ; because although his bond contained the first, namely, the obligation to retire it by making payment to the creditor, that resolves into an obligation *ad factum præstandum*, which can warrant diligence only against the person ; but when the additional clause, obliging the debtor to make payment to the cautioner himself is adjoined, there is then a definite liquid obligation of debt, which authorises diligence of every kind.¹

296. What is necessary in the enforcement of a bond of relief in which the cautioner's demand of payment to himself is made only conditional upon the debtor's failure to retire the bond.

On such a bond, it would be necessary to give two charges, the first *ad factum præstandum*, to establish the failure, and to found the second and liquid charge for the debt, so that diligence of all kinds might proceed.²

297. In what circumstances is the bond of corroboration used ?

(1.) When the original bond has been the subject of judicial discussion settled by decree.

(2.) For the purpose of accumulating the principal and arrears of interest.

(3.) When a new obligant is conjoined in liability.

(4.) When an additional loan is granted.

(5.) When the debt is constituted by account, or bill, in order to save it from prescription.

(6.) The assignee to a cash-credit bond sometimes takes a bond of corroboration, as it is desirable that the amount due should be admitted by the debtor.

¹ Jur. St. ii. 427 ; Ross Lect. i. 169.

² Ross Lect. i. 171.

(7.) By the representatives of the debtor after his death, to supersede the necessity of a decree of constitution.

(8.) By the debtor after the creditor's death, to save the expense of confirmation.

(9.) When the heir of the debtor is liable, as heir of entail, a bond of corroboration is sometimes taken, binding him and his heirs whomsoever.

298. For what reasons ought a new obligation by the principal and cautioners, for an old debt, to be taken in a corroborative form?

If the new obligation is not taken in a corroborative form, (1) the cautioners may have the benefit of the septennial limitation; and (2) the original obligation may be innovated, and diligence raised on it consequently discharged, the former obligation and all that has followed on it being superseded where innovation takes place.¹

299. What is the extent of the relief competent to a new cautioner who joins with the principal debtor and original cautioner in a bond of corroboration to the creditor?

(1.) Where the new cautioner is introduced at the request of the debtor, (*p*) and not of the original cautioners, he has that relief only which is competent to them.

(2.) But when he has been introduced at the request of the original cautioners, or with their acquiescence, to relieve them from a present demand, he is regarded as cautioner for them, and will have total relief against them, as well as against the principal debtor.²

300. When the granter of a bond of presentation has been compelled to pay the debt in consequence of his

¹ Ersk. 3, 4, 22; Duff on Deeds, 61.

² Bell's Prin. 272.

(*p*) The legal presumption is, that he is so introduced; Bell's Com. i. 370. See also Lennox, 18th May, 1815. Here a corroborating cautioner granted bond singly, and did not take a letter of relief from the principal debtor; held that this was not evidence that the corroborator interposed at desire of co-obligants in the original bond, and they were found entitled to relief from him *pro rata*.

inability to present the debtor; Has he relief against the debtor's cautioners in the original bond? State the reasons.

No; (1) because when one has paid a debt for which he has become liable *subsidiarie*, in consequence of any real or constructive delinquency of his own, he is not entitled to relief against the proper cautioner;¹ and (2) because the cautioners have, for their own relief, an interest in the success of the diligence against the debtor.²

V. TRANSMISSION OF PERSONAL RIGHTS.

301. What are the different methods by which moveable rights may be transmitted?

(1.) By act of the law, as in the transference of moveables by marriage.

(2.) By judicial sentence, as arrestment and forthcoming, or confirmation.

(3.) By voluntary conveyance.³

302. What rights cannot be assigned? State the reasons.

(1.) Conjugal and (q) parental rights; because they must be exercised by the husband or father in that express character.

(2.) Public offices not patrimonial; on the principle of *delectus personæ*.

(3.) Salaries of public officers, unless in so far as they exceed a reasonable maintenance; because the public service requires that they shall have a sufficient support.

(4.) Leases of ordinary endurance, not urban; on the principle of *delectus personæ*.

(5.) Rights of liferent "cannot, properly speaking, be transmitted to another;" because they necessarily terminate at the death of the person on whom they are conferred, but the profits during the liferenter's life may be assigned.

(6.) Alimentary rights, unless for alimentary debts; because such provisions are given for the subsistence of the grantee.

¹ Ersk. 3, 3, 70.

² Ersk. 3, 5, 1.

³ Menzies, 294 (304); Smith, 11th Dec. 1811, F.C.

(q) See note (i), p. 36.

(7.) Legacies before the testator's death ; because there is no debt, and no one to whom intimation could be made.

(8.) A partner's interest in a private company, to the effect of making the assignee a partner ;(r) on the principle of *delectus personæ*. But his share of the stock may be assigned,(s) to be made forthcoming at the dissolution of the company.¹

303. What are the classes into which moveable rights are divided, and how are they distinguished by the law of England ?

Moveable rights are divided into two classes :—(1) moveable corporeal, or moveable real rights, of which the owner possesses the *ipsum corpus*, having a *jus in re*, as ships, merchandise, jewels, &c. ; and (2) incorporeal moveable rights, the possessor of which has only a *jus ad rem* or a right of action against other parties, without any real right in the thing which he is entitled to demand and recover, as debts or claims constituted by bonds, contracts, or other writings. These rights are distinguished by the law of England into rights in possession or chattels and choses in action.²

304. Describe and account for the peculiarity of style of the deed of assignation generally in use.(t)

The deed of assignation generally in use does not contain words expressly assigning and transferring the right, but is in the form of a mandate or power of attorney, empowering the assignee to demand and discharge the debt, with a surrogation and substitution of the assignee into the cedent's place. The peculiarity of the style originated in the circumstance that rights constituted

¹ Stair, 3, 1, 2 ; Ersk. 3, 5, 2 ; ² Ersk. 3, 1, 2 ; Ross Lect. 177 ;
Duff on Deeds, 70 ; Menzies Lect. Menzies Lect. 231 (239).
251 (260).

(r) There may, however, be a sub-contract between a partner and a stranger for a division of his share of the profits. This does not make the stranger liable for the debts of the partnership ; Ersk. 3, 3, 22 ; Bell's Com. ii. 654.

(s) It may be attached also by diligence.

(t) There seems to be some misprint in this question, and also in the answer, which describes first one and then another form of assignation as that "generally in use." Perhaps "generally" should have been "originally," and the answer should have commenced in the past tense.

by obligation, or choses in action, were formerly intransmissible without the consent of the debtor. But although the creditor could not transfer the right, it was competent for him to grant a mandate or procuratory to another, as his attorney, to demand and discharge the debt in his name. The assignment, however, in this form being truly a procuratory, was from its nature revocable ; but after the introduction into the style of the terms *cedent* and *cessionaire*, and the clause of surrogation and substitution, from the French deed of *transport*, a deed which operated as a direct conveyance, the effect of that writ was also adopted, and the Scottish assignment passed into a deed of absolute transmission.¹

305. Enumerate the clauses of the assignation.

(1) Narrative ; (2) subsumption ; (3) clause of assignation ; (4) powers of the assignee ; (5) clause of warrandice ; (6) clause of delivery ; (7) clause of registration ; (8) testing clause. (*u*)

¹ Stair, 3, 1, 2, and 3 ; Ross Lect. 176 *et seq.* ; Menzies Lect. 232 (240) *et seq.*

(*u*) By the "Transmission of Moveable Property (Scotland) Act, 1862" (25 & 26 Vict. c. 85), a simpler form of assignation than that referred to in this and the preceding answer was introduced. By section 1 of that Act, it is provided that "it shall be competent to any party in right of a personal bond, or of a conveyance of moveable estate, to assign such bond or conveyance by assignation in, or as nearly as may be in the form set forth in Schedule (A), hereto annexed, and it shall be competent to write the assignation or assignations on the bond or conveyance itself in, or as nearly as may be in, the form set forth in Schedule (B), hereto annexed, which assignation shall be registrable in the books of any court, in terms of any clause of registration contained in the bond or conveyance so assigned ; and such assignation, upon being duly stamped and duly intimated, shall have the same force and effect as a duly stamped and duly intimated assignation according to the forms at present in use."

Schedule (A) is in these terms :—"I, A B, in consideration of, &c. (*or otherwise as the case may be*), do hereby assign to C D, and his heirs or assignees (*or otherwise as the case may be*), the bond (*or other deed, describing it*), granted by E F, dated, &c., by which (*here specify the nature of the deed, and specify also any connecting title and any circumstances requiring to be stated in regard to the nature and extent of the right *required*) [**sic—should be "assigned"*]. In witness whereof, &c. (*insert testing clause in usual form*)."

Schedule (B) is in these terms :—"I, A B," &c., "do hereby assign to C D," &c. (as in Schedule A), "the foregoing (*or within written*) bond (*or other writ or deed, describing it*), granted in my favour (*or otherwise as the case may be, specifying any connecting title and any circumstances requiring to be*

306. On what principle is the doctrine of intimation founded, and what is the effect of intimation?

The doctrine of intimation is founded on the principle that delivery or possession is necessary to complete a conveyance; and the object of intimation is the attainment of as complete possession as the subject admits of, by placing not only the debtor but every person who has an equitable or legal interest in the matter under an obligation to treat it as the assignee's property. Intimation of an assignation is tantamount to possession, and its effect, therefore, is (1) to put the debtor in *mala fide* to pay to the cedent or any other assignee; (v) and (2) to complete the transference.¹

307. To what risks is the holder of an unintimated assignation exposed?

(1) The debtor being in *bona fide* to pay to the cedent, the debt may thereby be discharged; (2) the debt may be carried off by a second assignation intimated to the debtor; or (3) by diligence at the instance of the cedent's creditors; (x) (4) there being no concurrence of debit and credit between the debtor and the assignee before intimation, compensation is not pleadable by the latter, and therefore he may be compelled to pay a debt incurred by him to the debtor, and assigned to a third party, which would otherwise have been compensated.²

308. An assignation of a bond was intimated to the debtor after the date of the cedent's sequestration, but before the confirmation of the appointment of the trustee on his sequestrated estate; Was the intimation timeously made?

No; because the Bankrupt Act declares that the act and war-

¹ Jarman's Conveyancing, 461; ² Ersk. 3, 5, 2.
Menzies Lect. 241 (249); Ersk. 3,
5, 3.

stated in regard to the nature and extent of the right assigned). In witness whereof, &c. (insert testing clause in usual form)."

By section 3 it is provided that the forms of transmission and intimation then in use may still be employed.

(v) This should rather be "any assignee making intimation subsequently."

(x) Or by confirmation by them after his death.

rant of confirmation in favour of the trustee shall *ipso jure* vest the moveable estate in him as at the date of the sequestration, to the same effect as if intimation had been made at that date.¹

309. What is the procedure in making notarial intimation of an assignation?

The assignee or his (y) procurator goes along with a notary and two witnesses to the debtor, exhibits to him the bond and assignation, and delivers a copy of the latter, with a written statement signed by the assignee or procurator, called a schedule of intimation, in which the bond and assignation are recited, and by which the assignee or procurator intimates the assignation, and protests that the debtor should not pretend ignorance thereof, or of the intimation; that he should not make payment to any other person than the assignee; and that if he do in the contrary he should be liable in repetition of the sums in the bond, and also in damages and expenses; the assignee or procurator at same time takes instruments in the hands of the notary; and the *res gestæ* are embodied in an instrument signed by the notary and witnesses.²(z)

¹ 19 & 20 Vict. c. 79, § 102.

² Jur. St. (3rd edit.) ii. 351.

(y) Intimation found null, because the notary acted also as procurator; Scot, 3rd July, 1623, M. 846.

(z) By the Transmission of Moveable Property Act, already referred to, it is declared that "An assignation shall be validly intimated (1) by a notary-public delivering a copy thereof, certified as correct, to the person or persons to whom intimation may in any case be requisite; or (2) by the holder of any assignation, or any person authorised by him, transmitting a copy thereof, certified as correct, by post to such person, and (in the first case) a certificate by such notary-public in, or as nearly as may be in the form set forth in Schedule (C), hereunto annexed; and (in the second case) a written acknowledgment by the person to whom such copy may have been transmitted by post as aforesaid of the receipt of the copy, shall be sufficient evidence of such intimation having been duly made. Provided always, that if the deed or instrument containing such assignation shall likewise contain other conveyances or declarations of trust purposes, it shall not be necessary to deliver or transmit a full copy thereof, but only a copy of such part thereof as respects the subject-matter of such assignation;" 25 & 26 Vict. c. 85, § 2.

Though the Act speaks only of delivery to the debtor, the intimation may, if necessary, be made by leaving the copy at his dwelling-house. See Schedule (C).

310. Is it necessary to produce both the bond and the assignation to the debtor in making notarial intimation ?

It is not necessary to exhibit the bond ; but it is indispensable to produce the assignation.¹(a)

311. To whom ought intimation to be made when the debtor is (1) domiciled abroad ; or (2) a pupil ; or (3) a corporation ; or (4) a joint-stock company ?

(1.) When the debtor is domiciled abroad, intimation ought to be made to him at the office of the keeper of the Record of Edictal Citations on letters of supplement passing under the Signet, the service being made by a messenger-at-arms, in presence of a notary and witnesses ; and notice should also be given to the debtor by letter, if his address is known.

(2.) When the debtor is a pupil, intimation should be made to the pupil personally, and also to his tutors, and if these are not known, or if the pupil has no tutors, intimation ought to be made to his "tutors and curators, if he any have," at the Edictal Citation office on letters of supplement.²(b)

(3.) When the debtor is a corporation, intimation to the trea-

¹ Watson, M. 3687.

² 1 & 2 Vict. c. 118, and A. S., 24th Dec. 1838.

When the intimation is made notarially, it must be in presence of two witnesses. The certificate sets forth the day and also the hour when (which is important in case of competition), and the manner in which, the intimation was made, and is signed by the notary and witnesses. A testing clause, "*in usual form*," is appointed to be inserted, so that the place and date of signing the certificate must be specified, as well as the date of the intimation, which is stated at the commencement.

The Act does not state whether or not the acknowledgment of the receipt of the copy of the assignation must be holograph or attested ; but where not attested, it should be holograph, so as to secure for it the privilege, which otherwise it would not have, of proving its date. If the acknowledgment is sent by post without an envelope, the post-mark would prove the date at least of its despatch.

(a) Not now necessary. See *supra*, note (z), p. 151.

(b) The letters of supplement here referred to, of which a form will be found in Juridical Styles, iii. 280, were originally executed at the market-cross of Edinburgh and pier and shore of Leith. The alteration in the mode of execution was introduced by 6 Geo. IV. c. 120, § 51, and Act of Sederunt, 11th July, 1828 ; the Act 1 & 2 Vict. c. 118, only made a change regarding the office where the execution is served.

surer is sufficient ; but entry of the assignation in the books of the corporation is of chief importance.¹

(4.) When the debtor is a joint-stock company, intimation is made by leaving the schedule at the registered office of the company ; or by sending it through the post-office addressed to the company ; or by giving it to a director, or the secretary, or other principal officer.²(c) [Intimation of assignations of policies of life assurance is regulated by "The Policies of Assurance Act, 1867."]

312. What is the effect of the debtor's private knowledge of the assignation ?

¹ Keir, M. 738.

² 19 & 20 Vict. c. 47, § 53.

(c) The Act here referred to is repealed by "The Companies' Act, 1862" (25 & 26 Vict. c. 89), which provides, § 72, that any notice "may be served on the company by leaving the same or sending it through the post in a prepaid letter, addressed to the company at their registered office." This applies only to companies registered under the Act, as they only have registered offices.

By the Companies Clauses (Scotland) Act, 8 Vict. c. 17, § 117, and the Railway Clauses (Scotland) Act, 8 & 9 Vict. c. 38, § 130, it is provided that any notice may be served on companies coming under those Acts 'by the same being left at or transmitted through the post, directed to the principal office of the company, or one of their principal offices, where there shall be more than one, or being given personally to the secretary, or in case there be no secretary, then by being given to any one director of the company.'

Where companies are established under special Acts, provision is always made in regard to notices.

There being no direction in the Transmission of Moveable Property Act, 1862, as to the mode of intimating to companies, the provisions of the Act above mentioned may be taken as regulating the persons, &c., to whom in the several cases to which they are applicable, intimation should be made ; but the solemnities required by the Transmission Act must always be observed.

In the case of private companies, intimation should be given to the company at or addressed to its place of business, and, if required to be given to the partners as individuals, it should be done personally or at their dwelling-houses. The notarial certificate should set forth to which of the partners the copy was delivered for behoof of the company, where such is the case.

In the case of joint-stock companies not registered, provision is generally made for this purpose in the contract or constitution of the company ; and where known, it should be followed ; but intimation to the manager, secretary, or other official, at the place of business would be sufficient. See Watson, 19th Nov. 1755, M. 850.

(1.) The debtor's private knowledge of the assignation cannot be pleaded by the assignee when there is a competition of creditors, as intimation is necessary to complete the transference. (2.) But it is thought that private knowledge would put the debtor *in mala fide*, and interpel him from paying to the cedent.¹(*d*)

313. What equipollents have been admitted to formal intimation, and for what reasons?

(1.) Citation of the debtor in an action in which the assignation is founded on.²

(2.) A charge of payment to the debtor on the registered bond and assignation at the instance of the assignee;³ and

(3.) Production of the assignation in a multiplepinding in which the debtor and assignee are parties;⁴ because these are judicial acts, exposing the assignation to the knowledge of the judge as well as of the debtor.⁵

(4.) A written promise by the debtor to pay the debt to the assignee;⁶ and

(5.) Payment of interest by the debtor to the assignee;⁷ because these imply not only the debtor's knowledge of the assignation, but are in effect a corroboration of the debt.

(6.) The debtor's holograph acknowledgment of intimation;⁸

(7.) His subscription as a consenter to the assignation;⁹

(8.) Intimation by letter from the assignee, with an answer returned;¹⁰

(9.) Notice to the debtor's factor, with an entry by the factor in the books of the debtor of the transference of the debt;¹¹(*e*) and

(10.) The attendance of an assignee to shares in a public com-

¹ Stair, 3, 1, 7; Ersk. 3, 5, 5; Bell's Prin. 1465.

² White, M. 854.

³ Ersk. 3, 5, 4.

⁴ Dougall, M. 851.

⁵ Ersk. 3, 5, 4.

⁶ Home, M. 868.

⁷ E. of Aberdeen, 9th April, 1730, Cr. and St. Ap. 44.

⁸ Newton, M. 850.

⁹ Turnbull, M. 868.

¹⁰ Wallace, 27th May, 1858, 15 D. 688.

¹¹ E. of Aberdeen, *supra*.

(*d*) Private knowledge is not to be relied on. See Faculty of Advocates, M. 866. It cannot be proved by witnesses; Dickson, M. 878.

(*e*) It was so held in the case referred to, by the House of Lords reversing the judgment of the Court of Session; but it would not be prudent to rely on this circumstance alone as evidence of intimation.

pany, at a meeting of the partners, and acting and voting as in right of the cedent, by virtue of the assignation,¹(*f*) because in these cases the debtor is held to be duly certiorated of the assignation, which is all that the law requires.

(11.) Registration in the registers for publication of assignations of heritable rights, and of personal rights relating to lands ; because these registers are established by statute to give notice to the lieges of transferences of such rights.²

314. What assignations require no intimation ?

- (1.) Legal assignation, by marriage.³
- (2.) Judicial assignation, by sequestration, adjudication, arrestment, and forthcoming, &c.⁴(*h*)
- (3.) Transference of bills and notes of indorsation.⁵
- (4.) Transference of funds belonging to the drawer, in the hands of the drawee, on acceptance of a draft or protest for non-acceptance.⁶
- (5.) Assignations in favour of the debtor.⁷(*i*)

¹ Hill, 12th Nov. 1847, 10 D. 78.

⁴ Ersk. 3, 5, 6.

² Ersk. 3, 5, 6 ; Edmund, 16th Nov. 1855, 18 D. 47.(*g*)

⁵ Ersk. *ib.*

³ Ersk. 3, 5, 7.

⁶ Bell's Prin. 1465.

⁷ Paul, 22nd May, 1835, 13 S. 818.

(*f*) In Hill's case, referred to, the assignation was produced at the meeting.

(*g*) Aff. 26th Feb. 1858, 3 Macq. 116.

(*h*) It is to be kept in view, however, that intimation in some of these cases, though not necessary to complete the right of the assignee, may be so on other grounds. Thus, "a debtor to a woman by a moveable bond is *in bona fide* to pay to her, even after her marriage, until it be intimated to him. And in like manner a debtor to one by an heritable bond is *in bona fide* to make payment to the original creditor, notwithstanding its being adjudged by a third person, till he be properly certified of the decree of adjudication ;" Ersk. 3, 5, 7 ; and "If a debtor, in ignorance of the sequestration, have paid his debt *bona fide* to the bankrupt, he shall not be obliged to pay it a second time to the trustee ;" 19 & 20 Vict. c. 70, § 111. It may also be noticed, that though it is usual to describe some of the modes of transference here referred to as "assignations requiring no intimation," it is not quite accurate to do so. Either they are in themselves intimations, as arrestment and forthcoming, than which nothing can be more complete, or the intimation required is of a different nature, as in a decree of adjudication, which must be recorded in the appropriate register.

(*i*) An assignation in favour of the debtor might in some cases operate as an extinction by confusion rather than as a transference of the right. Such, however, was not the nature of the deed in the case of Paul, referred to ; it

(6.) An assignation of a tack of teinds to the heritor.¹(k)

315. In what respects are holograph acknowledgments of intimation privileged as contrasted with other holograph writings?

Holograph acknowledgments of intimation prove their dates, although unattested by witnesses, being a privilege which is not allowed to other holograph writings.² [But see change of law as to holograph testamentary writings, Conveyancing Act, 1874, sect. 40.]

316. Where there are several obligants, does intimation to one of them complete the conveyance, or prevent another obligant, without notice, from paying the debt to the cedent?

Intimation to one of the debtors completes the conveyance; but such intimation is not effectual for interpellating the other

¹ Montgomery, M. 841.

² Newton & Co., M. 850.

approached more nearly to an assignation by the debtor, having been (on the ground stated in Ans. 328, where the case is again referred to) held, though not bearing, to be a conveyance of a *jus crediti* by a party who was also a trustee under the trust deed which created it, so that he was, though in different characters, both debtor and creditor. It was held that the assignation required no intimation to the granter in his character of trustee, and that the recorded infestment following on the deed, which was in the form of a bond and disposition in security, was equivalent to intimation to his co-trustee; but it is to be observed that this principle applied equally to both trustees, and was of itself sufficient to decide the case.

(k) There was formerly a kind of assignation which was completed without intimation, viz., that of a patent, because there was no one to whom intimation could be made; but this was changed by "The Patent Law Amendment Act, 1852" (15 & 16 Vict. c. 83), which provides, § 35, "That there shall be kept at the office appointed for filing specifications in Chancery a book or books, entitled 'The Register of Proprietors,' wherein shall be entered, in such manner as the Commissioners shall direct, the assignment of any letters patent, or of any share or interest therein," "with the name or names of any person having any share or interest in such letters patent, the date of his or their acquiring such letters patent share and interest, and any other matter or thing relating to or affecting the proprietorship in such letters patent." "Provided always, that until such entry shall have been made, the grantee or grantees of the letters patent shall be deemed and taken to be the sole and exclusive proprietor or proprietors of such letters patent." Duplicates of all entries made in the said Register of Proprietors are transmitted to the office of the Commissioners in Edinburgh.

obligants who have not got notice from making payment to the cedent.¹

317. Where a creditor has arrested funds in Scotland belonging to his debtor, which had previously been assigned by him in trust for creditors by an unintimated English creditor-deed, such deeds operating as a complete transference by the law of England without intimation; Whether will the arrester or the assignee in trust be preferred? State the reason.

It has been found that the arrester is entitled to the preference; because the question, whether an English creditor-deed excludes arrestments, relates to a competition of diligence for attaching a fund in Scotland, and falls to be determined by the law of Scotland, which requires intimation.²

318. A, under articles of roup, feued lands to B, who subsequently sold them to C, and the latter executed over them a bond and disposition in security, which was recorded in the Register of Sasines. C having become bankrupt, and it having been discovered that his title to the lands was inept, his trustee sued A, the superior, to grant a charter to him as trustee, but the holder of the bond appeared and claimed a preferable right; Whether or not is his claim valid? State the reason.

The bond-holder's claim is valid; because C, the bankrupt, had a personal right to the lands under the articles of roup and charter which was carried by the assignation to writs in the bond; and registration of the bond, being equivalent to intimation of that assignation of the personal title, the trustee therefore could obtain a charter only under burden of the bond-holder's preferable right.³

319. An assignee to a bond, "with all that has followed or may follow thereupon," sued the son of the debtor for payment, who did not represent his father, but had

¹ Stair, 3, 1, 10; Ersk. 3, 5, 5.

² Edmond, 26th Nov. 1855, 18 D.

³ Donaldson, 5th July, 1855, 17 47; aff. 26th Feb. 1858.

D. 1053.

granted to the cedent a bond of corroboration ; Is the son in a position to plead that the assignee has no title to proceed against him, in respect that the bond of corroboration was not specially assigned ? State the reason.

No because the bond of corroboration as well as every other accessory right, is transferred to the assignee by virtue of the assignation to the debt itself.¹(*l*)

320. Where diligence against the debtor has been begun by the cedent, before granting the assignation, in whose name ought it afterwards to proceed ?

The diligence must be continued in name of the cedent ; because the messenger-at-arms cannot judge of the effect of the assignation, and his powers are limited to the terms of the warrant.² But a new warrant may be obtained by the assignee for charging and arresting in his own name on production of the extract registered bond and assignation in the Bill Chamber.³ Caption in the assignee's name may proceed on a charge at the instance of the cedent.⁴

¹ Cultie, 2 Br. Sup. 197.

² 1 & 2 Vict. c. 114, § 7.

³ Ersk. 3, 5, 8 ; Stewart, M. 834.

⁴ Young, M. 8137.

(*l*) In the case of Cultie, cited, it was held that an assignation, without even the usual clause, "with all that hath followed or may follow thereupon," "reached a bond of corroboration, as being delivered." See also *Wilson v. Birrel*, 28th Feb. 1751, M. 40, where it was held that a conveyance of an infetment of annualrent, "with all that has followed," &c., carried right to a decree of adjudication that had been led on the personal obligation in the bond, though it was not mentioned ; but in *Geddes*, Feb. 1751, Elchies, it was found that assignation of a bond and two decreets, with all other bonds, bills, decreets, &c., did not convey a decree of forthcoming, which the cedent had obtained ; and in *Grahame*, 15th Dec. 1814, F.C., it was held that an assignation (in an entail of certain lands and teinds) of "all tacks, assedations," &c., "of and concerning the said lands and teinds thereof," did not convey a lease of the teinds that the entailer had obtained from the titular. It may therefore, and keeping in view the decision of the House of Lords in *Horne*, 21st Feb. 1842, 1 Bell, 1, and subsequent cases as to the necessity for special assignations to vest singular successors with right to collateral obligations, be doubted how far the doctrine in this answer would now be recognised.

321. Can an assignee do diligence in his own name if the cedent die before intimation?

Yes; it being provided by 1690, c. 26, that special assignments lawfully made by a deceased person, though neither intimated nor made public in his lifetime, should be good and valid rights and titles to possess, pursue, or defend, although the sums of money therein contained be not confirmed;—and it being also declared by 1693, c. 15, that special assignments, although unintimated, might be registered after the death of the granter at the instance of the assignee on production of the deed to the keeper of the register.

322. May exceptions competent to the debtor be proved by the oath of the cedent?

Exceptions competent to the debtor may be established by the cedent's oath before the assignation is intimated; but not afterwards, unless the matter has been made litigious by the debtor prior to the intimation; or unless he can prove by a reference to the *assignee's* oath that the assignation is gratuitous.¹(*m*)

323. A, ostensibly the proprietor of two shares in a public company but in reality holding them in trust for B, assigned one of them in security of money lent him individually by C, who was given to believe that he was the true owner, and C intimated his assignation. Several months afterwards the estates of A were sequestrated, and a competition arose between B, the real owner of the shares, on the one hand, and C, the assignee in trust, and D, the trustee in the sequestration, respectively, on the other; What are the rights of the parties?

C is entitled to hold the share assigned to him in security of the advance made to A; because latent equities cannot prevail against an intimated special assignation.² But B, the real owner, will be successful in a competition with D, the trustee in A's

¹ Ersk. 3, 5, 9; Ivory's Note, 278; Fac. of Advocates, M. 866.

² Redfearn, 26th May, 1813; 1 Dow App. 50.

(*m*) Or in trust for the cedent.

sequestration for the other share, as D takes the share as it stood in A, and the trust may be proved by writ or oath.¹(n)

324. Is the confirmation of an executor-nominate or of an executor-creditor preferable to an unintimated assignation?

(1.) The confirmation of an executor-nominate is not preferable; because he represents the deceased.²

(2.) But the confirmation of an executor-creditor excludes an unintimated assignation; because such an executor is a third party, and the statute 1690, c. 26, which ordains special assignations to be valid titles to sue and defend without confirmation, protects the rights of competing creditors.³

325. What is the effect of an assignation of bank stock, not completed according to the regulations of the bank, in a question with the bank itself or with a competing arrester?

A bank may refuse to recognise an absolute transfer of stock *inter vivos* if it be not completed according to their regulations. But in a question with a competing arrester, the security will be effectual if the essentials of a transfer and intimation had been observed, it being *jus tertii* for an arrester to plead the peculiar forms of the bank, for whose behoof alone they are prescribed.⁴

326. What is necessary to complete a security over an assignable lease?

(1.) When the lease is for a period under thirty-one years the assignee, in order to make the security effectual, must obtain possession.⁵(p)

¹ Gordon, 5th Feb. 1824, 2 S. 675.

² Grant, 5th Feb. 1828, 6 S. 489.

³ Ersk. 3, 5, 3.

⁴ Menzies Lect. 256 (265); Thom-

son, 23rd Dec. 1842, 5 D. 379(o).

⁵ Ersk. 2, 6, 25.

(n) This is under the provisions of 1696, c. 25, which limits the mode of proof to writ or oath; but see Middleton, 8th Feb. 1861, 23 D. 526, where, in the circumstances, the Act was held not to apply, and a proof *prout de jure* of latent trust was allowed.

(o) This was a case of railway shares. See as to bank shares, Weatherly, 3rd June, 1824, 3 S. 92.

(p) But the possession may be civil as well as natural. See Sime's Tra.,

(2.) An assignation in security of a lease, during the currency of a sub-lease, may be completed by intimation to the sub-tenant.¹

(3.) An assignation in security of a lease for thirty-one years or upwards, recorded in the Register of Sasines in terms of the Registration of Leases Act, may be completed by registration in the Register of Sasines without possession.²

327. What is necessary to complete an assignation of rents by a personal deed, and what is the effect of such an assignation in a competition with real rights?

(1.) The assignation must be completed by intimation to the tenants, or by decree in an action of maills and duties at the assignee's instance against them.³

(2.) A personal assignation of rents cannot compete with completed real rights; because such an assignation creates only a personal claim against the tenants, while the cedent continues proprietor of the lands; but when the heritable right is transferred to another, the assignation loses its force, on the principle that the rents are an accessory of the real right to the lands.⁴

328. A party, whose feudal title was subsequently found to be inept, but who was a trustee along with another, and had a *jus crediti* under a trust-deed executed by his father, granted an heritable bond on which infestment was expedite and recorded, over property conveyed by the trust-deed. What is the effect of the bond?

The granter having no feudal title, the bond as an heritable security is null, but it will be effectual as a conveyance to the holder of the granter's *jus crediti* under the trust-deed; on the principle that it contained an implied assignation to it which required no intimation to him as trustee, being himself the granter; and with regard to the other trustee, that registration of the infestment was equivalent to intimation.⁵

¹ Syme's Trs., 23rd May, 1806, F.C.

² 20 & 21 Vict. c. 26, § 1.

³ Bell's Com. i. 64 and 793.

⁴ Ersk. 3, 5, 5; Bell's Com. i. 64 and 793).

⁵ Paul, 22nd May, 1835, 13 S. 818. See Edmond, 16th Nov. 1855, 18 D. 47; aff. 26th Feb. 1858. (r)

infra, note 1. In Syme's case, referred to, the assignee, besides making intimation, had levied the sub-rents. See also Bell's Com. i. 64, note 6.

(r) 3 Macq., App. 116.

329. May a sum of money lying in bank in a bankrupt's name, which never came into the hands of the trustee in his sequestration, be arrested by the subsequent creditors of the bankrupt after his discharge, in preference to assignees of the trustee, whose assignation was not intimated to the bank? State the reason.

The money so situated cannot be arrested by the bankrupt's subsequent creditors; because he was divested by the sequestration, and it is not necessary, in a question with them, that the assignation should be intimated to the bank.¹

330. Where a party assigns a policy of assurance (1) by an assignation *ex facie* absolute, but qualified by a back-bond declaring it to be in security of a special debt; or (2) by an assignation bearing, *in gremio*, to be granted in security of a certain special debt; Is the assignation, in either case, available as a security to the grantee for subsequent advances?

(1.) An *ex facie* absolute assignation, though qualified by a back-bond declaring it to be in security of a special debt, is available to the grantee as a security for subsequent advances.²

(2.) But where the assignation bears, *in gremio*, to be granted in security of a special debt, the right of the grantee is restricted to that debt, and does not extend to subsequent or extrinsic transactions.³

331. Is the indorsee of a deposit-receipt entitled to uplift the contents after the indorser's death? State the reason.

It is thought that the indorsee is not entitled to uplift the contents after the indorser's death; because the indorsation of such a document does not operate as a transference of the fund, but is merely a mandate to draw the money, and a warrant to the bank to pay it, terminating, like other mandates, on the death of the mandant.⁴(s)

¹ Adam, 17th Jan. 1845, 7 D. 276.

² National Bank, 3rd Dec. 1858,

³ Douglas's Cra., 11th June, 1794; 21 D. 79.

Bell's Fol. Ca. 41.

⁴ Barstow, 5th Dec. 1857, 20 D. 230.

(s) It was so held by the Lord Ordinary in the case of Barstow, referred to; but in the Inner House the judgment went on another ground; two of

VI. DISCHARGES, AND DEEDS OPERATING DISCHARGE.

332. What are the different modes by which obligations may be extinguished?

(1.) Specific performance; as payment of the debt, or fulfilment of the engagement.

(2.) Acceptilation; being a discharge by the creditor's bare consent or voluntary act, without payment or performance.

(3.) Compensation; which occurs when the same persons become both debtor and creditor to one another, operating as an extinction of both debts, in so far as there is a concurrence of debit and credit.

(4.) Novation; being the substitution of a new obligation by the same debtor to the same creditor, to the effect of extinguishing the original obligation, and the cautioners in it.

(5.) Delegation; being the substitution of one debtor for another, with consent of the creditor.

(6.) Confusion; which occurs when there is *concursus debiti et crediti* in the same person, as when the debtor succeeds to the creditor by inheritance, or *vice versa*.

(7.) Implied discharge; founded on a presumption of payment, arising from the conduct of the parties. It obtains when three consecutive discharges have been granted of periodical payments, as rents, feu-duties, &c., so as to extinguish all preceding arrears.

(8.) Prescription; being a legal presumption, arising from the lapse of time, of abandonment, or of satisfaction.

(9.) Statutory limitation; being a denial of action on a document of debt after a certain time.

(10.) Conventional limitation; by a stipulation in the obligation that it should not be binding after a certain time.

(11.) Judicial discharge of the debtor under the Bankrupt Act;

the judges expressly reserved their opinion on this point, and reference was made to Steel, M. 1409, as leading to an opposite view. There a gratuitous bank draft was sustained, though not presented till after the drawer's death. Two cases which have since occurred may be referred to—viz., National Bank, 20th Jan. 1866, 4 M'P. 312 (as to a cheque), and British Linen Co., decided 15th June, 1866 (as to a deposit-receipt). The rule in both cases seems to be that the documents are warrants to receive the money but subject to the inquiry *quo animo* they were given, the contents not being necessarily transferred.

which operates as an extinction of all his obligations contracted before the sequestration.

(12.) Taciturnity; which operates as an extinction on the presumption of payment arising, in the circumstances of the case, from the creditor's silence.¹

333. May a debtor safely rest satisfied on payment with the cancellation of the bond? State the reason.

The debtor ought to take a formal discharge, and not rest satisfied with the cancellation of the instrument; because although the bond is destroyed, its tenor may be proved at the creditor's instance, while the fact of payment cannot be instructed by parole evidence.²

334. In what case is it necessary to have a discharge separate from the bond; and what should be done to give such discharge full effect?

There must be a separate discharge when the bond is recorded [for preservation]; because it is permanently deposited in the register. The discharge should be recorded, and a reference to it marked on the margin of the record of the bond.³

335. When a debt is paid and a discharge granted by one who is not the proper creditor, and not entitled to receive the money; What is the effect of the discharge?

The general rule is, that the discharge is ineffectual. However, it is not necessarily void, for if the debtor made the payment in *bona fide*, and had sufficient probable grounds for believing that the party receiving the money was the true creditor, the debt will be extinguished. By payment to one who is not entitled by law to receive it is not accounted a *bona fide* payment, as payment to a messenger executing diligence.⁴

336. Does possession by a factor of his constituent's grounds of debt imply power in the factor to discharge the principal sum and interest?

¹ Ersk. 3, 4, 1 *et seq.*; Bell's Prin. 555 *et seq.* (t)

² Menzies Lect. 260 (269).

³ Menzies Lect. 260 (269).

⁴ Ersk. 3, 4, 3; Menzies Lect. 262 (271).

(t) Menzies Lect. 259 (268) *et seq.*

Possession by a factor of the grounds of debt implies power to discharge the interest, but not the principal sum, unless he has repeatedly received and discharged principal sums, with the knowledge and approval of his constituent.¹

337. When the debt is paid by the debtor's agent from his own funds, In what terms ought he to take the acknowledgment of the receipt of the money; and for what reason?

The acknowledgment ought to bear that payment was made by the agent; because, in the absence of such a statement, the legal presumption is, that payment had been made by the debtor himself.^{2(u)}

338. The agent for a creditor in a bond having paid him, out of his own funds, the interest for a series of years on behalf of the debtor, also his client, and got receipts from him in favour of, but did not deliver them to the debtor, the receipts bearing that the payments were made by the debtor, and that "all concerned are hereby discharged;" Was the bond extinguished, in a question with the debtor, to the extent of the interest so paid? State the reason.

No; because the receipts were never delivered to the debtor, nor were the payments which they vouched made out of the debtor's funds.^{3(v)}

¹ Duncan, 24th Jan. 1851, 13 D. 518.

² Hallyburton, M. 11528.

³ Wood, 20th Dec. 1848, 11 D. 254.

(u) The direction here given is judicious, but whether the statement as to the legal presumption is correct may be doubted. See Ans. 338 and note(v).

(v) The statement in this answer requires explanation. In the circumstances (as regards payment) stated, even if the receipts had been delivered to the debtor, the debt would not have been *extinguished*, though the creditor might have been changed; but the question in the case referred to (Wood) was different. The debt was secured on an estate, of which the creditor brought a process of ranking and sale, after the institution of which the agent took an assignment to the security to the extent of the interest paid, and in virtue thereof claimed a preference in the ranking, which was objected to by creditors holding postponed securities, on the ground that the *security* had been discharged; but the objection was repelled. It may be noticed that the agent for the lender, though he had at one time been, had prior to the date of the loan

339. What is the effect of a general discharge added to a discharge of particular debts; and does a general discharge of all claims include (1) a claim of relief from a cautionary obligation undertaken for the debtor, on which the cautioner has not been distressed; or (2) a debt which the granter had previously assigned, but of which the assignation had not been intimated; or (3) a bill of which the term of payment has not arrived?

A general discharge, added to a discharge of particular debts, will include only (1) debts *ejusdem generis*; and (2) debts of the like or less importance than those particularised.¹ A general discharge of all claims will not include (1) a claim of relief from a cautionary obligation undertaken for the debtor, because the granter cannot be supposed to have had it in view;² nor (2) a debt previously assigned by the creditor, although not intimated; because the presumption is against an intention to transact in relation to a subject already conveyed away;³ (y) but (3) it includes a bill of which the term of payment has not arrived; because the debt is ascertained and not contingent, although the period of credit be still current.⁴(z)

¹ Stair, 1, 18, 2; Ersk. 3, 4, 9.

² Logan, M. 5041.

³ M'Taggart, 24th Nov. 1830, H. of L., 4 W. & S. App. 361.(x)

⁴ Adam, 9th May, 1831, 9 S. 570.

ceased to be agent for the borrower, though, had he continued to be so, the decision would probably have been the same. In an earlier case, Tod, 13th Dec. 1838, 1 D. 231, where a similar question arose, the result was different, the security for the interest paid being held to have been extinguished; but there the receipts were very special—viz., “Received by us, factors for A” (the creditor), “by our own hands, by stating the same to B’s” (the debtor) “debit, in account-current with ourselves, the sum of _____, being a year’s interest,” &c., “of which year’s interest all concerned are hereby discharged;” but even in this case Lord Fullerton, who had been the Ordinary to it, stated (in the case of Wood) that he had “come to the conclusion,” “not without hesitation,” that the security was extinguished. In neither case was it alleged that the debt was discharged *quoad* the debtor.

(x) Reversing 6 S. 641.

(y) This case is very shortly reported, but one ground of the decision was, “the general discharge does not import payment of the bond, without which the debtor must be liable to the assignee,” so that something may have turned on the terms of the discharge.

(z) The case of Adam, referred to, turned on the construction of the terms

340. Can a guardian appointed in England, by a deed in the English form, competently discharge a Scottish heritable bond due to his ward?

If the deed of appointment contains powers co-extensive with those belonging to guardians in Scotland it will be a good title to discharge; but it is thought that the guardian must first make up inventories under the Scottish Statute of 1672, c. 2.¹(b) [A *curator bonis* does not require special powers to discharge a bond and disposition in security in favour of his ward, Wills, 6 R. 1096.]

341. Is it necessary when an obligation is followed by inhibition or adjudication, to make special mention in the discharge of such diligence? State the reason.

It is not absolutely necessary to make mention of the inhibition or adjudication in the discharge; because payment extinguishes even a real burden without express discharge, as being merely

¹ Young & Co., 8th July, 1831, F.C.(a) Duff on Deeds, 259.

of the discharge, which was one granted by creditors, under a settlement by composition of all debts *contracted* (not due) previous to 1st June, 1822. The bill was dated 25th May preceding, and the Court "considered that, on a fair construction, the discharge included that bill;" but the decision hardly warrants the rule here deduced from it; but see the case of Harris, 2nd March, 1822, 1 S. 370, where a discharge on composition was held to include a debt due at the date, but on which no composition was paid.

(a) 9 S. 920.

(b) So far as the case of Young & Co., cited, goes, it is adverse to the doctrine here stated. The Lord Ordinary found that a discharge by the guardian (who was a liferenter under the bond) for herself, and as taking burden on her for her sons, and by one of them, who was beyond pupilarity, would be valid. Before judgment was given in the Inner House, the parties had arranged to have a *factor loco tutoris* appointed to the children; but the Court recalled the Lord Ordinary's interlocutor, as they were of opinion that *the discharge by the English guardian would not be sufficient*. It is to be observed that powers of guardians in this respect depend on law, and not on the deed of appointment.

A debtor in an heritable bond, destined to a married woman in liferent, for her liferent use allenary, and her lawful children equally, whom failing, her own nearest heirs in fee, wished to pay it off, but raised doubts as to the power of the liferentrix to grant a valid discharge. Judicial factor appointed to concur with her in discharging, uplifting, and re-investing it under the same destination; Gowans, 10th March, 1849, 11 D. 1028; and Prentice, *ibid.*; Montignani, 17th Feb. 1866, 4 M'P. 461.

accessory to the debt, and also has the lesser effect of removing the *nexus* of real diligence. But as it is of importance to the debtor that the discharge should appear on the proper register, it is always advisable to refer specially to the diligence, for the purpose of registration.¹

342. Can a cautioner or stranger, on payment of the debt, demand an assignation from the creditor?

(1.) A cautioner paying the debt is entitled to an assignation, to the effect of operating his relief.

(2.) When payment is made by a stranger, the debtor cannot prevent him demanding an assignation, if the creditor chooses to grant it; but the creditor cannot be compelled to grant an assignation unless the debtor shall consent.^{2(c)}

¹ Duff on Deeds, 262.

² Bell's Prin. 557, 558.

(c) This statement may require further explanation. As laid down by Erskine (3, 5, 11), while every one who, not being the debtor, pays a debt is entitled to an assignation, yet no creditor can be compelled to assign a right to his own prejudice. The circumstances under which such questions arise are generally either (1) where a creditor calling up his debt from the debtor if offered payment on an assignation to a third party, or (2) where a creditor, proceeding (as by sale) to make his security effectual, is attempted to be stopped by the holder of a postponed security tendering payment and demanding an assignation; and the principle that regulate the two classes of cases may be stated in the words of Lord Mackenzie, who said (1), in Smith, 19th June, 1844, 6 D. 1164, where the demand was granted—"A third party is not entitled to say to a creditor, I want an investment, give me yours; here is payment of your debt. While a creditor is content to retain his debt, he may do so; but where he seeks to enforce payment, it is a different case. In the case I refer to, an agent or friend of the debtor, not a cautioner, offered payment to save him from jail, and I held, and the Second Division concurred, that if the creditor insisted on putting the debtor in jail, he must assign his security to a third party paying the debt;" and (2) in Cunningham's Trs. 18th Dec. 1847, 10 D. 307, where the demand was refused, his Lordship observed—"The question then is, whether, seeing Hutton can sell, the postponed heritable creditor is entitled on payment to demand an assignation? To entitle him to do so, some legitimate reason must be stated. It would be a reason that the assignation was necessary to enable him to recover his debt, not that he is entitled to acquire or keep up a good investment. But there is no such legitimate reason here." See also Rainnie, 7th March, 1822, 1 S. 377; M'Gillivray, 10th June, 1826, 4 S. 697; Austin, 24th May, 1827, 5 S. 701. Where an assignation is demanded on reasonable grounds, the debtor's refusal to consent would not defeat the right.

343. What is the effect of a discharge to the principal debtor, reserving recourse against the cautioner?

Such a discharge is valid, as between the debtor and the creditor; but being a discharge of a qualified and conditional nature, it does not extinguish the obligation in a question with the cautioner, so as to exclude his recourse upon the debtor, if the creditor should enforce the claim against the cautioner.¹(e) [See as to discharge of acceptor of a bill reserving claims against indorsers, Muir, 2 R., H. of L. 148.]

344. A widow grants a general discharge of all she can ask or claim in and through her husband's death; Does that include a claim for mournings, or her aliment to the next term? State the reason.

The general discharge does not include the widow's mournings, because they are part of the husband's funeral expenses; nor her aliment to the next term, because it is part of the family expense.²

345. Discharges were granted to two debtors, one under a private composition-contract, and the other under the Sequestration Act of 54 Geo. III., "upon payment" of a composition; What is the effect of a discharge in each case?

(1) The discharge upon payment under the private composition-contract is conditional, and does not operate until payment of the composition;(f) (2) but the discharge under the old

¹ Smith, 22nd Nov. 1821, F.C.:(d) aff. 1 W. & S. 315.

² Rennie, 16th May, 1800, F.C.

(d) 1 S. 159.

(e) In the case of Smith, quoted, the discharge was granted to the principal, on payment of a composition, reserving recourse against the cautioner for the balance, but it contained a special declaration that it should not be effectual to the principal, in case the cautioner should thereby be liberated; and on this ground the cautioner was held liable. Had the discharge been absolute (unless under a sequestration) the cautioner would have been relieved. See Munro, 18th May, 1821, 1 S. 19, where a tenant having sublet a farm to another, with a cautioner, the sub-tenant deserted the farm, and the principal having resumed possession and sublet it to another, the cautioner was held to be discharged. See Ans. 348.

(f) This would of course depend on the terms of the composition-contract, which might be framed so as to discharge the whole debt except the composition. See Woods, 9th Feb. 1860, 22 D. 723, where it was held not so to operate.

Sequestration Act is absolute of the original debt, and the words, "upon payment," are interpreted, "except as to payment" of the composition.¹(g)

346. A discharge is granted to a debtor under a private composition-contract, which contains an acknowledgment of the creditor's receipt of bills in security of the composition, and an absolute release of the debtor; Will the discharge be effectual to the debtor, if he admits that the creditor did not receive the bills; or that they were dishonoured, and that the composition was not paid?

(1) The discharge will not be effectual if it be admitted that the creditor did not receive the bills; because the consideration of the discharge must be implemented.²(h) (2) But it will be binding although the bills were dishonoured, and the composition was not paid; on the principle of satisfaction, which wholly extinguishes the debt, the creditor having accepted vouchers for the composition in full satisfaction of his claim.³

347. What is the effect of the discharge of one obligant as affecting another?

(1.) An unqualified discharge to an obligant liable for the whole debt, proceeding not upon payment but upon satisfaction,(h) extinguishes the obligation as to all the obligants, on the principle

¹ Bell's Com. 5th edit. ii. 473.

² Graham, 9th Dec. 1828, F.C.(i)

³ Glass, 12th May, 1825, 4 S. 1.

(g) This was not properly a question of construction. The statute referred to expressly bears that the order to be pronounced by the Court, under § 59, "shall declare the bankrupt discharged, except as to the payment of the composition." An erroneous practice, however, of declaring the bankrupt discharged *upon payment of the composition*, had arisen, and the question as to the effect of this having come before the Court, it was held that the discharge must be read as if the proper statutory words had been used, and that in future the style of the order should be altered accordingly.

(h) The claim, however, in Glass (cited) was restricted to the amount of the composition.

(i) 7 S. 152.

(k) It would be more accurate to have said, "without consideration," as where there is satisfaction acceptance may not arise.

of acceptilation ; because the party discharged having paid nothing to the creditor, has no claim of relief against the others.

(2.) Where one of the co-obligants, liable *pro rata*, pays only (l) his proper share, and receives an absolute discharge, the creditor's claim against the others is not affected.

(3.) An unqualified discharge to an obligant upon full payment does not extinguish the obligation, but it subsists for his relief against the other obligants for the excess beyond his own share.¹

(See Answer, No. 256.)

348. How may a cautioner's obligation be extinguished otherwise than by express discharge ?

(1.) By the direct discharge of the debtor without the cautioner's consent.²

(2.) By the discharge of a co-cautioner.³

(3.) By extinction of the principal obligation, by payment, compensation, prescription, or otherwise.⁴

(4.) By the septennial limitation.⁵

(5.) By an essential alteration on the obligation without the consent of the cautioner.⁶

(6.) By the creditor discharging any security or neglecting to complete a security, to the cautioner's prejudice.⁷

(7.) By the creditor's refusal to accept payment when offered.⁸

(8.) By liberation of the debtor after incarceration.⁹

(9.) By the creditor giving time to the debtor by positive contract, without the cautioner's consent.¹⁰ [See *Bowe v. Christie*, 6 M'P. 642.]

(10.) By misrepresentation or concealment on the part of the creditor.¹¹

¹ Stair, 1, 18, 5 ; Ersk. 3, 3, 74 ; Duff on Deeds, 264.

² Wallace, 13th Jan. 1825, 3 S. 433.

³ See Ans. 272.

⁴ Forbes, 1735, Elch. Cautioner, 4.

⁵ 1695, c. 5.

⁶ Bell's Prin. 259.

⁷ Wallace, M. 3389 ; Bell's Prin. 264.

⁸ Cooper, 27th June, 1834, 12 S. 834.

⁹ Menzies Lect. 210 (216).

¹⁰ Macartney, 23rd Sept. 1831, 5 W. & S. 504.(m)

¹¹ Royal Bank, 20th July, 1844, D. 1418.

(l) This should rather be "liable only *pro rata*, pays," &c.

(m) Reversing 8 S. 862.

VII. BILLS AND NOTES.

349. In what respect do bills, as written instruments, enjoy higher privileges than deeds?

(1.) They are probative, though not holograph, nor granted *in re mercatoria*.

(2.) They prove their date without witnesses.

(3.) The designation of the drawer and acceptor is not essential.

(4.) They may be accepted by one notary for sums exceeding £100 Scots.(n)

(5.) They may be drawn, accepted, or indorsed by mark.

(6.) They are valid though issued blank in the payee's name.

(7.) They are transmissible by indorsation without intimation, and if blank indorsed, by delivery.

(8.) They operate as a complete assignation of funds in drawee's hands on acceptance, or protest for non-acceptance.

(9.) Indorsees acquiring the bill during its currency are not liable to latent objections.

(10.) They warrant summary diligence, and that on a charge of six days, without a clause of registration.

350. In what respects are foreign bills subject to the municipal law of this country?

Foreign bills are subject to the municipal law of this country when it applies to them by positive statute, as in the case of prescription and execution; but these instruments being intended for the negotiation and adjustment of mercantile transactions between the subjects of different states, are in other respects regulated by the general principles of mercantile law.¹

351. Enumerate the essentials of bills.

(1.) The engagement to pay, which must be unconditional.

(2.) The person to whom payment is to be made, called the payee.(o)

(3.) The sum engaged for, which must be money, not commodities.

¹ Menzies Lect. 317 (327).

(n) See Ans. 355.

(o) But see *supra*, 349 (6).

- (4.) The time of payment, which must be a determinate period.
- (5.) The stamp.¹

[352. State the essentials of promissory-notes.

- (1.) A promise to pay.
- (2.) The payee, Duncan, 10 M.P. 984.
- (3.) The sum, which must be money, must be fixed.
- (4.) The date of payment must also be fixed.
- (5.) The stamp.]

353. Is a bill valid drawn and accepted on Sunday?

A bill drawn on Sunday is valid;²(*p*) but it is doubtful whether an acceptance dated on Sunday is effectual. In England such an acceptance is held to be invalid;³ but the English act prohibiting Sunday trading is somewhat broader than the Scottish statute.

354. May a legacy be made by a bill?

A legacy may be made by *indorsing* a bill;⁴ but it is doubtful whether an *acceptance* granted as a legacy would be sustained.

355. What is the effect of bills signed by initials or mark, or by a notary or notaries, with or without witnesses?

(1.) A bill signed by initials or mark, either with or without witnesses, is binding, on proof that this is the party's usual mode of subscription, and that the subscription is genuine. But such a bill will not warrant summary diligence; because its genuineness requires to be proved by extrinsic evidence.

(2.) A bill signed by two notaries and four witnesses, with a notarial docquet, is valid; and as that mode of execution is probative in formal deeds, such a bill warrants summary diligence.

[See § 41 of the Conveyancing Act, 1874, as to execution by one notary or a justice of the peace.]

(3.) A bill signed by one notary and two witnesses will be sustained in an ordinary action; but it seems not recoverable by summary execution.

¹ Bell's Prin. 309.

² Broom's Legal Maxims, 21;

³ Elliot, 20th Jan. 1844, 6 D. 411.

Menzies Lect. 323 (334).

⁴ Barbour, M. 6097.

(*p*) The bill in Elliot's case was drawn in London, and it was observed that the date of *acceptance* is that on which the obligation is entered into.

(4.) A bill signed by a notary or notaries without witnesses is not probative, but will be sustained on proof of authority; because a bill signed for the granter by another person, although not a notary, is binding on proof of authority.¹

356. What is the effect of a bill written on paper unstamped, or bearing a wrong stamp?

(1) A bill written on unstamped paper is null; (2) when a stamp of a higher value and of the proper denomination is used, the bill is good; (3) when the stamp is of a wrong denomination, but of the proper value, it may be rectified on payment of a penalty;(r) (4) when a bill, drawn in and payable out of the United Kingdom, purports to be one of a set, the whole must be delivered duly stamped, otherwise the amount is not recoverable.²

357. Is it necessary that the place and date of drawing be superscribed in bills?

(1.) It is not necessary to superscribe the place; unless perhaps (1) when required by the terms of the bill to ascertain the place of payment, as when the drawee is ordered to "pay me here;" and (2) in bills drawn at usance, as the date of payment of such bills cannot be ascertained without knowing the place at which the bill is drawn.³

(2.) The date is not indispensable, unless for summary diligence, it being provided by the Mercantile Law Amendment Act that "where any bill of exchange or promissory note shall be issued without date, it shall be competent to prove by parole evidence the true date at which such bill or note was issued, provided always that summary diligence shall not be competent on any bill or note issued without a date."⁴

358. What is the presumption with regard to the date of an indorsation; and what is the effect of that presumption in questions with arresters, and the heir challenging on deathbed?

¹ Bell's Com. i. 307; Dickson Evid. i. 412 (§ 794); Thomson on Bills, 534 (31).

² See *Stamps*, Ans. 181.

³ Menzies Lect. 321 (332).

⁴ 19 & 20 Vict. c. 60, § 10.

(r) Besides the duty.

The indorsation is held to be of the same date as the bill ; and the effect of the presumption is, in questions with arresters, that it protects a *bona fide* onerous indorsee against diligence used to attach the fund in the acceptor's hands subsequent to the date of the acceptance, although before the actual date of indorsation.^{1(s)} But the Mercantile Law Amendment Act enacts that, when a bill shall be indorsed after the term of payment, the indorsee shall be deemed to have taken it subject to all objections or exceptions to which it was exposed in the hands of the indorser ;² and it further provides, that when bills or notes are issued without a date, the date may be proved by parole evidence ;³ and accordingly it is thought that the true date of the indorsation may be proved by parole, in order to ascertain whether the indorsee is liable to the objection adverted to.

359. Enumerate the different modes of fixing the date of payment of bills.

The term of payment may be (1) at a specified date ; (2) so many days, weeks, or months after date ; (3) at sight, or at a certain period after sight ; (4) on demand ; (5) in foreign bills, at usance, double, treble, or half usance.

360. What is the effect of a bill written by the drawer, and having his name inserted *in gremio*, but not signed by him ?

Such a bill appears to be binding ; but it will not warrant summary diligence, because the fact of its being holograph, which is the test of its validity, requires to be proved.⁴

361. What is the effect of a bill drawn or accepted with a contingency or condition ?

(1.) A bill *drawn* with a condition or contingency is null as a bill ; but this rule does not strike at the usual condition in foreign bills drawn in sets, each payable if the others be not paid.⁵

¹ Smith, M. 1502.

² 19 & 20 Vict. c. 60, § 16.

³ 19 & 20 Vict. c. 60, § 10.

⁴ M'Bean, 22nd Nov. 1806 ; Hume, 57 ; Dickson Evid. i. 413 (§ 795).

⁵ Bell's Com. i. 421.

(s) It may be doubted whether the rule here stated rests on the presumption referred to, and does not rather follow from the quality which the drawing and acceptance of the bill attaches to the fund by operating as an assignation thereof in favour of the holder of the bill at maturity.

(2.) The *acceptance* may be conditional, and such an acceptance will be effectual on the condition being fulfilled. But it must appear on the bill, or at least be in writing, and the payee must give immediate notice of the conditional acceptance to the drawer and the other parties interested.¹

362. What is the meaning of acceptance for honour ; and what is the extent of the liability of such an acceptor, and of his recourse on payment ?

Acceptance for honour is when a person interposes for behoof of the drawer, or any of the indorsers, and accepts the bill *supra* protest, in order to prevent its return with a charge of interest, exchange, and costs ; and the effect of the acceptance is to render the acceptor liable to all the parties in the bill, except to him for whose honour he has accepted, and to preserve recourse on payment against that party and all who, on the bill, are responsible to that person.²

363. A bill was drawn and accepted, payable to the drawer or order, "or failing me by decease, to my second son," and was indorsed by the drawer to the second son ; Was it a good bill to the indorsee ? State the reason.

No ; because when the bill is drawn, both the obligation and the payee must be certain, and not conditional or alternative.³

364. A bill addressed to "A B, factor of Islay," was drawn "for value in account with C D of Islay," and was accepted "A B ;" Did that import a personal obligation on A B ? State the reason.

Yes ; because the words "for value in account," &c., merely point out the party on whose account A B acknowledged himself to hold or to have received value, while the acceptance, and consequent obligation to pay, are absolute.⁴(t) [See Brown, 2 R. 615.]

¹ Thomson on Bills, 349 (223).

² Bell's Com. i. 426.

³ Inglis, M. 1404.

⁴ Chiene, 20th July, 1848, 10 D. 1523.

(t) The first question involved in Chiene's case was whether the acceptance was that of Chiene himself, or of Islay, binding himself by his factor, and turned rather on the address of the bill than on the wording of the instrument. The words "factor of Islay" were held to be simply a designation, and the

365. What is the effect of an acceptance anterior to the writing of the bill?

The acceptor is liable for any sum afterwards inserted, to which the stamp is applicable; on the principle of a mandate by the subscriber to the holder to fill up what sum he pleases, limited only by the operation of the Stamp Acts.¹

366. A draws a foreign bill upon his debtor B, payable to C, who presents it for acceptance, and protests it for non-acceptance; D, a creditor of A, afterwards serves an arrestment in the hands of B, to attach the fund due by him to A; Is the arrestment preferable to the claim of C, the holder of the bill? State the reason.

No; because where a drawee has funds belonging to the drawer, presentment for acceptance, and protest for non-acceptance, are equivalent to an intimated assignation of the sum drawn for;² and therefore C, the creditor in the bill, is preferred to D, a posterior arrester.³

367. What is the effect of an indorsement, (1) to "A B only;" (2) "to A B, for my use;" (3) "to A B, without recourse;" (4) of an indorsement with a condition annexed?

(1.) An indorsement "to A B only," prevents the indorsee from re-indorsing the bill.

(2.) An indorsement "to A B, for my use," is restrictive, making the indorsee the indorser's mandatory, whose mandate may be recalled at pleasure; but the indorsee may discount the bill, the presumption being that he acts for his constituent. (u)

¹ Smith, 27th Feb. 1824, 2 S. 755;
Grassick, 8th July, 1846, 8 D. 1073.

² Bell's Prin. 339.
³ Gavin, M. 1495.

acceptance to be that of the individual himself. The second question was as to the effect of the words "value in account," which it was argued made the obligation contingent on the factor being possessed of funds of his constituent; but this was over-ruled. See on this point note (b), to Ans. 375.

(u) Professor G. J. Bell, in his Commentaries, does not make the distinction here stated between the cases 1 and 2. He says (Com. i. 426, 7th ed.)—" 'Pay to A B only,' or 'Pay to A B for my use,' is restrictive, and gives no power to re-indorse." Mr. Thomson states the rule as in this answer. It is not easy to discover any principle for the distinction.

(3.) An indorsement "to A B, without recourse," prevents any demand from coming back on the indorser, who would otherwise be liable.

(4.) A condition annexed to an indorsement will be binding on the acceptor, if the bill should be accepted with the condition in the indorsement, and the non-performance of the condition will re-invest the debt in the indorser.¹

368. What is the drawer's obligation on signing the bill?

By signing the bill, the drawer engages conditionally to pay it in the event of the drawee's failure to accept or pay, provided due notice be given to the drawer of the dishonour.²

369. In what circumstances may a bill be transferred by delivery?

(1) When made payable to the bearer; or (2) to a payee *nominatim*, or the bearer; or (3) when blank indorsed.

370. What is the effect of a party's indorsing a bill when there is no previous indorsation?

It has been held that such an indorsation has the effect of a collateral undertaking by the indorser, by which he renders himself liable as an obligant along with the acceptor.³(x) [See, however, *Walker v. Mackinlay*, 6 R. 1133, where held, in a case between the drawer and a third party, who had written his name on the back of the bill, by a majority of seven judges on construction of Mercantile Law Amendment Act and Bills of Exchange Act, 1878, that the third party's signature did not create a collateral obligation by him in favour of the drawer; affirmed 7 R., H. of L. 85.] But this doctrine scarcely appears to be consistent with the Stamp Laws as applied in the case cited *infra*,⁴ where it was held that the addition of a new obligant vitiated the bill, as it altered the obligation to which the stamp applied.⁵

371. A bill was blank indorsed by A, B, C, D, and E, successively; C having subsequently paid the contents to

¹ Bell's Com. i. 426; Thomson, 274 (185).

² Bell's Prin. 311.

³ Watters, 7th March, 1818, F.C.

⁴ Homes, 7th June, 1836, 14 S. 898.

⁵ See Bell's Com. i. 428.

(x) The same found, Don, 26th May, 1812, F.C.

340. Can a guardian appointed in England, by a deed in the English form, competently discharge a Scottish heritable bond due to his ward?

If the deed of appointment contains powers co-extensive with those belonging to guardians in Scotland it will be a good title to discharge; but it is thought that the guardian must first make up inventories under the Scottish Statute of 1672, c. 2.¹(b) [A *curator bonis* does not require special powers to discharge a bond and disposition in security in favour of his ward, Wills, 6 R. 1096.]

341. Is it necessary when an obligation is followed by inhibition or adjudication, to make special mention in the discharge of such diligence? State the reason.

It is not absolutely necessary to make mention of the inhibition or adjudication in the discharge; because payment extinguishes even a real burden without express discharge, as being merely

¹ Young & Co., 8th July, 1831, F.C.(a) Duff on Deeds, 259.

of the discharge, which was one granted by creditors, under a settlement by composition of all debts *contracted* (not due) previous to 1st June, 1822. The bill was dated 25th May preceding, and the Court "considered that, on a fair construction, the discharge included that bill;" but the decision hardly warrants the rule here deduced from it; but see the case of Harris, 2nd March, 1822, 1 S. 370, where a discharge on composition was held to include a debt due at the date, but on which no composition was paid.

(a) 9 S. 920.

(b) So far as the case of Young & Co., cited, goes, it is adverse to the doctrine here stated. The Lord Ordinary found that a discharge by the guardian (who was a liferenter under the bond) for herself, and as taking burden on her for her sons, and by one of them, who was beyond pupilarity, would be valid. Before judgment was given in the Inner House, the parties had arranged to have a *factor loco tutoris* appointed to the children; but the Court recalled the Lord Ordinary's interlocutor, as they were of opinion that *the discharge by the English guardian would not be sufficient*. It is to be observed that powers of guardians in this respect depend on law, and not on the deed of appointment.

A debtor in an heritable bond, destined to a married woman in liferent, for her liferent use allenary, and her lawful children equally, whom failing, her own nearest heirs in fee, wished to pay it off, but raised doubts as to the power of the liferentrix to grant a valid discharge. Judicial factor appointed to concur with her in discharging, uplifting, and re-investing it under the same destination; Gowans, 10th March, 1849, 11 D. 1028; and Prentice, *ibid.*; Montignani, 17th Feb. 1866, 4 M'P. 461.

373. Is a holder of a bill, who has acquired right to it from the drawer by indorsation, or by assignation, subject to objections pleadable against the drawer?

(1.) The holder of a bill who has acquired right to it, during its currency, by indorsation, is not subject to such objections, unless he has not paid value, or is aware of the bill having been dishonoured by refusal to accept.¹

(2.) An indorsee who has acquired right to the bill after the date of payment, is liable to all the objections to which the bill was subject in the hands of the indorser.²

(3.) The holder of a bill who has acquired right by assignation, is subject to all the objections pleadable against the cedent.³

374. When a bill has been lost or stolen, or fraudulently obtained, or is alleged to have been accepted for the drawer's accommodation; By whom must value be proved, and what is the nature of the proof?

(1.) When a bill has been lost or stolen, or fraudulently obtained, the holder must prove that value was given by him; but such proof may be parole.⁴

(2.) When a bill is alleged to have been accepted for the drawer's accommodation, the acceptor must prove the averment, and that only by the writ or oath of the drawer,⁵ unless there are circumstances raising a strong suspicion of fraud, which, it has been held, let in circumstantial evidence to prove the want of *bona fide* consideration.⁶(a) [See exposition by Lord Mure of circumstances in which proof at large in such cases is allowed, Ferguson, 7 R. 500.]

375. What is the meaning of the words "value received," or "value in account per invoice," in bills in which the payee is named?

¹ Bell's Com. i. 427.

² 19 & 20 Vict. c. 60, § 16.

³ Brown, 5th June, 1793; Hume, 40. 230.

⁴ 19 & 20 Vict. c. 60, § 15.

⁵ Cargill, 12th Feb. 1852, 14 D. 485.

⁶ Bannatyne, 13th Dec. 1855, 18 D.

Lord Mackenzie expressed doubt as to the judgment in Smith, as not having given sufficient effect to marriage as operating an assignation to husband. As to diligence on such bills, see *infra*, 338.

(a) It will be kept in view that this defence cannot be pleaded against a *bona fide* onerous indorsee.

The words "value received," import that value has been received, not by the acceptor from the drawer, but by the drawer from the payee; because "it is more natural that the party who draws the bill should inform the drawee of a fact which he does not know, than of one of which he must be well aware." But "value in account per invoice" expresses value between drawer and acceptor.¹(b)

376. When a bill is found in the indorsee's repositories with a general receipt of payment upon it, by whom is it

¹ Byles, 61 (8th ed. 77); Menzies Lect. 343 (354); Scott, M. 1535; Wilson, 1st Feb. 1848, 10 D. 560.

(b) The object of the distinction here stated, which may perhaps not be very apparent, is to enable the acceptor, where the payee has not actually given value to the drawer, to plead objections against the payee, which otherwise he could state only against the drawer; but it may be doubted whether in Scotland there is any foundation for such distinction, which seems to rest on the authority of an English case. In the case of Scott, quoted, the question was whether value was to be presumed where the bill did not bear that it had been received. In the case of Wilson, also quoted, the expression in the bill was "value in account as per advice from" the drawers, and it was held that these words referred to value as between the drawers and acceptors; but Lord Medwyn, in delivering his opinion, made the following observations:—"An English case was quoted to us (Da Costa), which it was said supported the view that 'value received' referred to the payee, on the ground that the drawer informs the drawee that he draws on him in favour of the payee, because he has received value of such payee, as it was unnecessary to tell the drawee that he had the drawer's funds in his hands. This was a case in pleading, and this may have been an ingenious remark to support the declaration prior to proof as to the real value. But I suspect Judge Bailey gives the true account of the insertion of such words—to inform neither the drawee nor payee of the value between the drawer and the one or the other, but for the public to show that it is not an accommodation bill, but for a valuable consideration, which applies of course to the original constitution of the bill by the assertion of value in the drawee's hands, admitted by the acceptance, and undertaking to pay it." If there were but two parties to the bill, neither of the expressions in question could refer to any one but the drawer; and the mere insertion of a payee seems to afford no ground for attaching a different meaning to them. The words "value in account," when used in an indorsation, may sometimes have a peculiar meaning, and may prevent the property in the bill from passing to the indorsee, except in so far as he has given value. See Forbes, M. 1472, where in a competition between the indorser and an executor-creditor of the indorsee the former was preferred.

presumed that payment was made, and what is the effect of the presumption?

The legal presumption is, that payment has been made by the acceptor, and the debt will be extinguished, unless the contrary be proved by the acceptor's writ or oath.¹(*d*)

377. Is immediate presentment for acceptance necessary in the case of a bill payable at a day certain when sent to the payee, or when forwarded to an agent for negotiation?

(1.) When a bill payable at a day certain is sent to the payee, without instructions, it is unnecessary to present it for acceptance until due, because the term of payment is fixed by the instrument itself.(*e*)

(2.) But when the payee is instructed to present the bill, or it has been sent to an agent for negotiation, it must be presented immediately, because acceptance adds greatly to the security of the bill.²

378. At what time must a bill or note be presented for payment?

(1) If payable *on demand*, the presentment must be immediate; but if the bill has been put in circulation, it will be sufficient to present it on the day after its receipt by post. (2) If payable so many days *after sight*, it must be presented on the last day of

¹ Martin, 8th Dec., 1854, 17 D. 143.

² Bell's Com. i. 433; Menzies Lect. 352 (362).

(*d*) There is a most important element in the case of Martin, referred to, omitted in this statement—viz., that the acceptance had been cancelled by scoring the acceptor's name at least with the tacit consent of the parties who claimed on it; and the bill was not found in the indorsee's repositories. Had the holder simply deleted the receipt and all the indorsations subsequent to his own, and allowed the acceptor's name to stand, the presumption might have been the other way; but it would be a safer practice, in such a case, either to allow no receipt to be written on the bill, or to have the real payer's name inserted in it. A bill found precisely as stated in the question might raise no such presumption because it might simply be that the last indorsee had put a receipt on the bill, though it is better not to do so, in anticipation of payment which he had not got.

(*e*) This rule holds betwixt the payee and the drawer; but if the question were to arise between indorsers, and acceptance and payment were refused in consequence of an intervening arrestment against the drawer, recourse might possibly be lost.

grace after expiration of that time, reckoned from the date of acceptance. (3) If payable at sight, it must be presented on the third day after acceptance, if such bills have days of grace, which is doubtful; but if they have not, the same rule applies to such bills as to bills payable on demand. [By 34 & 35 Vict. c. 74 it is enacted that every bill or note payable at sight or on presentation shall be deemed to be a bill or note payable on demand.] (4) If payable at a *day certain*, the bill must be presented on the last day of grace.¹ (5) The bill must be presented at a reasonable time before the day is out,^(f) and, if payable at a banker's, within bank hours.² (6) When the bill has been accepted for honour, it is unnecessary to present it to the acceptor until the day after it becomes due, or if he does not reside where it is payable, it is sufficient to despatch it for presentment by the post of that day.³(g) [The point in note g is now regulated by The Bank Holidays Act, 1871.]

379. At what place must a bill be presented for payment?

(1) If a place of payment is specified in the bill, presentment must be made at that place. (2) If a place of payment be specified by the acceptor in the acceptance, that is held to be a general acceptance, and it is not indispensable that presentment be made at the place specified, but it may be made to the acceptor himself. (3) But if the acceptor specifies a place, and adds the words, "and not elsewhere," or "there only," that is a qualified acceptance, and presentment must be made at the place.^(h) (4) Where

¹ Thomson, 430, 276, and 296; Bell's Prin. 337.

² Thomson, 437 (302).

³ 6 & 7 Will. IV. c. 58.

(f) In reference to this point, Professor Bell says, "If by the known custom of the place bills are payable only within limited hours, a presentment beyond these hours will not be sufficient" (1 Com. 436). The safe course is to present bills within bank hours; and in case of bills payable on demand, any other course might be very hazardous.

(g) "If the day following the day on which such bill of exchange shall become due shall happen to be a Sunday, Good Friday, or Christmas Day, or a day appointed by His Majesty's proclamation for solemn fast or of thanksgiving, then it shall not be necessary that such bill" shall be presented or forwarded "until the day following;" 6 & 7 Will. IV. c. 58, § 2.

(h) The rules 2 and 3 are contained in the Act 1 & 2 Geo. IV. c. 78, which Professor Bell (Com. i. 437, note) says seems to be applicable to Scotland as well as to England.

no place is mentioned, presentment must be made to the acceptor personally, or at his residence, or at his place of business, if held out by him as his office for all purposes; and if a company, at their place of business.^(k) (5) If neither the acceptor nor his residence can be found, presentment should be made to some one authorised to act for him, and at the exchange and market-cross; and if he is out of the kingdom, at the market-cross of Edinburgh, and pier and shore of Leith, and also at the party's last residence. (6) If he is dead, presentment should be made to his heirs. (7) If the acceptor has absconded, and has no house or place of trade, the bill is held to be dishonoured.¹

380. Within what time must notice of dishonour be given in the case of inland and foreign bills, to preserve recourse against the drawer and indorsers?

Notice of dishonour of foreign bills, and now also of inland bills, must be given within such time as is required by the usage of merchants; the rules apparently being, that notice must be given to persons residing in the same place before the expiration of the day after the dishonour; and to persons resident elsewhere, by next post; or if the proper day of notice be a day of public rest, it will be sufficient on the following day;^(l) and notice by each successive indorsee to the indorser preceding, must be given on the day following the receipt of notice to himself.²

381. Does the omission to give notice of dishonour of an accepted bill in the hands of an indorsee operate relief to all concerned? State the reasons.

The omission to give notice operates relief to the drawer and indorsers, because they are entitled to such notice in order to

¹ Thomson, 418 (286 *et seq.*); Bell's Com. i. 437; Menzies Lect. 355 (366). ² Thomson, 451 (344); Bell's Com. i. 441; 19 & 20 Vict. c. 60, § 14.

(k) Presentment at a place of business should be during business hours. What constitutes business hours is a jury question; Neilson, 7th Feb. 1843, 5 D. 518.

(l) Found in Mackenzie, 18th July, 1861, 23 D. 1310, that where a bill fell due on a Saturday, notice of dishonour was duly given if it reached the party on the Monday following.

enable them to take measures for their own security. But (1) want of notice will not relieve the acceptor, because he is the proper debtor and has no recourse; nor (2) the drawer or indorsers of accommodation bills, for the same reason; ¹(*m*) (3) when notice has been waived, or the want of it occasioned by delay consented to by the drawer or indorsers, they will not be released, being barred *personali exceptione* from pleading want of notice; ²(4) nor where they are aware of the dishonour; because notice is not a solemnity, but merely a requisite for enabling the parties to take steps for their security, and it is, consequently, unnecessary when they are in the knowledge of the dishonour. ³(*n*) (5) Where the acceptor has no funds, the holder is not bound to give notice to the drawer, because he suffers no damage by the want of it. ⁴(*o*)

382. What particulars ought the notice of dishonour to specify?

The notice of dishonour should import (1) that the bill was not accepted or not paid; and (2) that the holder claims in recourse from the person to whom notice is given, payment of the sum in the bill, interest, costs, and re-exchange. The bill ought to be

¹ Goldsmidt, 26th May, 1814, F.C.

² Davidson, 25th Feb. 1791; Hume

³ Watson, 10th March, 1824, 2 S. 34.

782; Cairns' Trs., 23rd June, 1836, 14 S. 999.

⁴ Littlejohn, M. 1569; Menzies Lect. 362 (373).

(*m*) The cases here must be distinguished. It is only the party for whose accommodation the bill is drawn who is not entitled to notice. An indorser is entitled to notice where the bill is for the accommodation of the drawer, Orr, 10th June, 1792, Hume 36; or of the acceptor, Brown, 14th June, 1809, Hume 62. The drawer is entitled to notice where it is for accommodation of the acceptor, Goldsmidt, 26th May, 1814, F.C., Hume 37; Bell's Com. i. 453, note 1; or of an indorsee, Henderson, 24th Nov. 1829, 8 S. 121. Knowledge that the bill is an accommodation one does not obviate the necessity for notice, Orr and Brown, *supra*.

(*n*) In Davidson's case, *supra*, note 3, the drawer had, during the currency of the bill, written to the holder intimating the acceptor's bankruptcy; desiring him to raise diligence on it when due; and stating that he would pay it. The safe course is to give notice, in case of knowledge being denied and difficulty in proving it.

(*o*) Unless it be a bill for the accommodation of the acceptor. See note (*m*), *supra*.

minutely described, so as to make it safe for the party to proceed against the drawer or prior indorsers for security.¹

383. In what cases and for what purposes is notarial protest necessary?

Notarial protest is indispensable for the following purposes:—

(1.) In foreign bills, to preserve recourse against the drawer and indorsers on non-acceptance or non-payment,² but not in inland bills.³

(2.) To enable an acceptor for honour to recover against the person for whose honour he has accepted.⁴

(3.) For summary diligence.⁵

(4.) It may be doubted whether notarial protest be still the only competent evidence of the assignment to the payee of funds in the drawee's hands consequent on his refusal to accept, (p) the Mercantile Law Amendment Act dispensing with notarial protest only where that was necessary in the case of inland bills for preserving recourse against the drawer and indorsers.⁶

384. Against whom, and for what, is protest taken when a foreign bill is protested for non-acceptance?

Against the drawee for non-acceptance; and against the drawer and indorsers, jointly and severally, for recourse; and against all concerned for interest, exchange, re-exchange, damages, and expenses.⁷

385. What are the proofs of a claim by one who accepts and pays *supra* protest?

(1) The protest and act of honour; (2) the retired bill; and (3) evidence of notice.⁸

386. When a bill is accepted *supra* protest, whether should

¹ Bell's Com. i. 439.

² Bell's Prin. 336.

³ 19 & 20 Vict. c. 60, § 13.

⁴ Bell's Prin. 322.

⁵ Bell's Prin. 338.

⁶ 19 & 20 Vict. c. 60, § 13.

⁷ Menzies Lect. 357 (368).

⁸ Bell's Com. i. 314.

(p) There seems to be no reason to suppose that the Act referred to has made any change in this respect, or that any evidence but that of notarial protest would be sufficient.

enable them to take measures for their own security. But (1) want of notice will not relieve the acceptor, because he is the proper debtor and has no recourse; nor (2) the drawer or indorsers of accommodation bills, for the same reason; ¹(*m*) (3) when notice has been waived, or the want of it occasioned by delay consented to by the drawer or indorsers, they will not be released, being barred *personali exceptione* from pleading want of notice; ²(4) nor where they are aware of the dishonour; because notice is not a solemnity, but merely a requisite for enabling the parties to take steps for their security, and it is, consequently, unnecessary when they are in the knowledge of the dishonour. ³(*n*) (5) Where the acceptor has no funds, the holder is not bound to give notice to the drawer, because he suffers no damage by the want of it. ⁴(*o*)

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¹ Goldsmidt, 26th May, 1814, F.C.

³ Davidson, 25th Feb. 1791; Hume 34.

² Watson, 10th March, 1824, 2 S. 782; Cairns' Tra., 23rd June, 1836, 14 S. 999.

⁴ Littlejohn, M. 1569; Menzies Lect. 362 (373).

(*m*) The cases here must be distinguished. It is only the party for whose accommodation the bill is drawn who is not entitled to notice. An indorser is entitled to notice where the bill is for the accommodation of the drawer, Orr, 10th June, 1792, Hume 36; or of the acceptor, Brown, 14th June, 1809, Hume 62. The drawer is entitled to notice where it is for accommodation of the acceptor, Goldsmidt, 26th May, 1814, F.C., Hume 37; Bell's Com. i. 453, note 1; or of an indorsee, Henderson, 24th Nov. 1829, 8 S. 121. Knowledge that the bill is an accommodation one does not obviate the necessity for notice, Orr and Brown, *supra*.

(*n*) In Davidson's case, *supra*, note 3, the drawer had, during the currency of the bill, written to the holder intimating the acceptor's bankruptcy; desiring him to raise diligence on it when due; and stating that he would pay it. The safe course is to give notice, in case of knowledge being denied and difficulty in proving it.

(*o*) Unless it be a bill for the accommodation of the acceptor. See note (*m*), *supra*.

(3.) By the Act 12 Geo. III. c. 72, § 36, made perpetual by 23 Geo. III. c. 18, § 55, it is provided that the same diligence should be competent upon promissory notes as upon bills; that they should bear interest as bills, and pass by indorsation; and that indorsees of notes should have the same privileges as indorsees of bills.

(4.) By section 42 of the Act 12 Geo. III. c. 72, it is enacted that summary execution should pass upon bills whether foreign or inland, and whether accepted or protested for non-acceptance, and upon promissory notes, not only against the acceptors of the bills or granters of the notes, but also against the drawers and indorsers, jointly and severally, excepting where the indorsation is qualified to be without recourse.

(5.) By section 43, it is provided that summary diligence should be competent to an indorsee, although the protest is not in his name, and although the bill is not re-indorsed to him, provided he produces a receipt or missive letter from the protesting indorsee showing that value has been paid to him.(s)

388. Is summary diligence on a bill payable to a woman, who is afterwards married, competent at the instance of her husband? State the reason.

The husband is not entitled to protest the bill in his own name, and then to use summary diligence at his instance, unless the bill has been indorsed by the wife before marriage; because that privilege is confined to the payee specified in the bill or note, or his order, and in this case there is nothing on the face of the document to show that the husband had acquired right to it.¹(t) But in the

¹ Smith v. Salby, 10th July, 1829, 7 S. 885.

(s) It was questioned whether, under the statutes, summary diligence was competent on a bill drawn and payable in England. Held that it was; Don, 13th June, 1850, 12 D. 1016; Mackenzie, 12th Dec. 1854, 17 D. 164. It had also been so held in the previous case of Jowett, 8th July, 1797, Hume 403. Here two Englishmen who had granted a bill to another Englishman came transiently to Scotland, and after being a month there were arrested at the creditor's instance on a *meditatione fugæ* warrant, and afterwards, while in jail, on horning and caption, raised on the bill and registered protest. They presented a bill of suspension and liberation; which was refused.

(t) See *supra*, 362. If, as there stated, the husband could indorse the bill so as to transfer the right to it, there seems to be no reason why he should not

case cited it was suggested that diligence on a protest, taken in name of both the wife and the husband, would have been competent, evidence of the marriage being produced in the Bill Chamber.

389. When is a bill payable on demand exigible ; within what time must summary diligence be raised on such a bill ; and from what time does the sexennial prescription run on it ?

(1) A bill payable on demand is exigible at its date ; (2) summary diligence is competent within six months after a demand has been made, although more than six months after the date of the bill ;¹ (3) the sexennial prescription on a bill payable on demand runs from its date.²

390. May an acceptance, blank in the name of the drawer, found in the repositories of the holder, be signed after his death by his executor to the effect of warranting summary diligence ? State the reason.

It has been held that such an acceptance may be signed by the executor of the holder as drawer, and that diligence may proceed in his name ; on the principle that the acceptance is an undertaking to pay the person who shall have right to the document.³(x)

¹ Bon, 21st Feb. 1846, 12 S. 1310.(u)

² Stephenson, 16th June, 1807, M. App. "Bill," No. 20.

³ M'Donald, 13th June, 1817, F.C.

raise diligence on it, as in both cases the validity depends on his being vested with right to the bill. In the case of Summers, 16th Dec. 1843, 6 D. 286, Lord Mackenzie expressed some doubt of the decision in Smith, *supra*, on the ground that "marriage operates an assignation which is held to be intimated to all the world." The difficulty of the case arises from the necessity for the title of a person applying for summary diligence appearing *ex facie* of the bill and relative documents, while the fact that the husband is really such does not so appear. This evidence of title is as essential to a valid indorsation, because if he cannot himself raise diligence on the bill, he cannot by indorsation put any one else in a position to do so. In Smith, Lord Gillies suggested that "the protest should have been in name of both" husband and wife ; and perhaps if diligence is in such a case to be attempted, the best way might be to adopt that course, and then to raise horning proceeding on a bill.

(u) Reported 20th July, 1850, 12 D. 1310.

(x) In the case of M'Donald, cited, the procedure was by ordinary action,

But Lord Ivory doubts this, and recommends an ordinary action ; because the executor's title does not appear *ex facie* of the instrument.¹

391. A protest was taken in name of the treasurer of a bank while the receipt to an indorser was granted by a branch agent ; Was summary diligence competent ? State the reason.

Summary diligence was incompetent on such a protest and receipt ; because they did not afford evidence *ex facie* that value had truly been paid to the bank, the protesting indorsee.²(y)

392. Where an indorser pays upon a receipt by a protesting indorsee, after registration of the protest, can he proceed with diligence in his own name on the extract registered protest ? State the reason.

It has been held competent for an indorser who had paid the last indorsee to raise horning, at his own instance, on a protest recorded in name of the indorsee, the receipt operating as an implied

¹ Ivory's Notes, 69 ; Ersk. 624.

² Summers, 16th Dec. 1843, 6 D. 286.

not summary diligence. The same course had been previously adopted in similar cases ; Robertson, M. 1676, where action was refused, and Fair, M. 1677, where it was sustained, and the report bears—"It was likewise said" (on the Bench) "that a blank acceptance found in the repositories of a defunct may be filled up by his representative, and diligence may proceed in his name;" but there seems to be no decision to this effect, and an ordinary action is certainly the safer course. It may be noticed, however, that bills accepted blank in the drawer's name, or bill-stamps signed blank, may be filled up by a different person, as drawer, from him to whom they were given, and be made the ground of summary diligence ; Smith, 27th Feb. 1824, 2 S. 755, where it was observed, "that if a holder had truly given value for a skeleton bill, it was of no consequence whether he appeared on it in the character of drawer or indorsee ;" and Grassick, 8th July, 1846, 8 D. 1078.

(y) The same principle was followed in Fraser, 21st June, 1853, 15 D. 756. Here there were two indorsations in these terms:—"Pay to the Agent of the North of Scotland Banking Company, at Macduff, or order. Alex. Lillie ;" and "Pay to the Manager, North of Scotland Banking Company, Aberdeen, or order. Robert Adam, agent ;" and it was held that, the agent not having been named, summary diligence could not proceed at his instance, or at the instance of any indorsee from him.

assignation ;¹(z) and according to the principle of that case, it is said by Professor Menzies, that "an indorser paying upon a receipt by a protesting indorsee would appear to acquire right to the extract, and to be entitled now to obtain a fiat for diligence in his own name, under the 7th section of the Act 1 & 2 Vict. c. 114 ;" but it is recommended as a safer course, by the same authority, to transfer the bill and protest by formal assignation.²(a) [See Service, 6 M.P. 172, for circumstances in which a charge on a second protest was suspended.]

393. What is the effect of alterations in bills ?

(1.) Alteration of a bill in a material part, after being issued, and without the consent of parties, renders it null, both at common law and under the Stamp Acts.³

(2.) Alteration, even in a material part, before issuing, and with consent of the parties, does not vitiate the bill as a document of debt, but deprives it of the privilege of summary diligence.⁴

(3.) Immaterial alterations to correct evident mistakes will not affect the validity of the bill.⁵(b)

(4.) Where a bill has been issued in such a state as to admit of its being altered to a larger sum without giving the document a suspicious appearance, the acceptor and indorsers will be liable to a *bona fide* onerous holder for the increased sum on the obligation

¹ Scott, 11th June, 1816 ; Hume 75.

² Menzies Lect. 366 (379).

³ Bell's Com. i. 417 ; Thomson, 179 (110).

⁴ Bell's Com. i. 319, Thomson, 179 (110) ; M'Rostie, 18th Nov. 1849, 12 D. 124 ; Dickson Evid. i. 459 (§§ 889, 895, 897).

⁵ Bell's Com. i. 417.

(z) By 12 Geo. III. c. 72, § 43, "summary execution by horning or other diligence shall be competent to the indorsee of a bill although the protest is not in the name of the indorsee craving the diligence, and although the bill is not reconveyed to him by indorsation, if he produces a receipt for the value by act of honour, or a missive letter from the protesting indorsee mentioning the dishonour." This, however, probably refers to unrecorded protests, as to which the same course had been sanctioned ; Harries, M. 1509.

(a) It was held competent to raise summary diligence on a second protest, although a prior protest at the instance of a subsequent indorsee had been recorded ; Freer, M. "Bill of Ex." App. 19.

(b) See Henderson, M. 17059, where the term of payment of a bill (dated 7th Oct. 1799) having been changed from Martinmas 1780 to Martinmas 1800, the bill was sustained.

to indemnify for negligence; but it will be otherwise if the alteration is capable of detection by ordinary vigilance.¹

(5.) Alteration to a smaller sum is not a ground of challenge to one profiting by the change.^{2(c)}

394. What is the effect, after the bill is issued, of (1) adding a second acceptor; (2) deleting the name of an indorser; (3) adding the words "conjunctly and severally;" (4) erasing the word "cautioner" from the name of one of the acceptors; (5) of an alteration in the date; the alterations being made without the consent of the parties?

(1.) The addition of a second acceptor annuls the bill under the Stamp Acts, as it is an alteration of the obligation.³

(2.) The deletion of the name of an indorser(*d*) frees subsequent indorsers, because it destroys their recourse.⁴

(3.) The addition of the words "conjunctly and severally" will not affect the bill; because without these words the acceptors are bound *in solidum*.⁵

(4.) The erasure of the word "cautioner," it has been held, frees the party who subscribed as cautioner; because although the drawer would not have been benefited by the alteration, it affects the cautioner's claim of relief against the other acceptors.⁶ [But cautionary obligation is incompatible with the nature of a bill, per Lord Pres. Inglis, Walker, 6 R. 1141.]

(5.) Alteration in the date is fatal; because it changes the dates of payment and prescription, and in effect creates a new instrument, for which a new stamp is required.^{7(e)}

¹ Menzies Lect. 350 (362); Dickson Evid. i. 460 (§ 893); Pagan, M. 1660; Watsons, 27th June, 1798, Hume 42; M'Lean, 20th May, 1834, 12 S. 613.

² Laidlaw, M. 16941.

³ Homes, 7th June, 1836, 14 S. 898.

⁴ Dickson Evid. i. 460 (§ 890).

⁵ Gordon, M. 14677.

⁶ Robertson, 27th May, 1825, 4 S. 40.

⁷ Bell's Com. i. 416.

(c) The fact here stated is incidently mentioned in the judgment, but the true ground seems to have been that the alteration was admitted to have been made by the acceptor himself. The question arose in an ordinary action, not under summary diligence.

(d) "Altering the name of one indorsee" is Mr. Dickson's statement, but the doctrine in the answer is correct.

(e) In Mitchell, 9th July, 1819, Hume 78, the alteration of the date from 22nd, which was Sunday, to 23rd, was held to nullify the bill, even as a ground of debt against the acceptor.

[395. State briefly the principal provisions of the Mercantile Law Amendment Act (1856) regarding bills and promissory-notes.

(1.) When a bill or note is issued without date, the true date of issue may be proved by parole, but summary diligence is not to be competent on such a bill or note.

(2.) The acceptance must be in writing, and signed by the acceptor on the bill, or on a part thereof if there are more than one part; the acceptance may consist "merely of the signature of the drawee;" Bills of Exchange Act, 1878; Walker, 7 R., H. of L., 85.

(3.) Bills drawn in Great Britain and Ireland, Islands of Man, &c., and payable in or drawn upon persons resident in the United Kingdom or islands, are to be held inland bills.

(4.) Notarial protest is not to be necessary to preserve recourse against the drawer or indorsers of an inland bill or promissory-note if presentment and dishonour is proved by competent evidence.

(5.) Notice of dishonour is to be given in the case of inland as in that of foreign bills.

(6.) When a bill or note has been lost, stolen, or fraudulently obtained, the holder proceeding thereon must prove that he gave value, but may do so by parole.

(7.) When a bill or note is endorsed after the period when it became payable, the indorsee takes it, subject to all objections to which it was subject in the hands of the indorser.]

396. What are the leading enactments of the statute 12 Geo. III. c. 72, regarding the prescription of bills?

(1.) That no bill or note shall be effectual to produce any diligence or action, unless such diligence shall be raised and executed, or action commenced, within six years from the time at which the sum in the bill becomes exigible.

(2.) That the Act shall not apply to bank notes.

(3.) That it shall be competent at any time after the expiration of the six years, to prove the debt contained in the bill, and that the same is resting-owing, by the oath or writ of the debtor.

(4.) That the years of minority of the creditor shall not be computed in the six years.(f)

(f) But it should seem that minority will not interrupt prescription if the

397. How may a bill be preserved from prescription ?

(1.) By an action commenced specially(*g*) on the bill within six years from the date of payment ; *i.e.*, citation on, or at least calling of the summons, and the action must be proceeded with without delay.¹

(2.) By diligence raised and executed on the bill, as by a charge on a registered protest.²

(3.) By production of the bill, in a sequestration of the debtor's estate.³

(4.) By production of the bill as a ground of claim in a judicial competition, as a ranking and sale, or a multiplepounding.⁴

(5.) By pleading compensation judicially on the bill.⁵

(6.) By entering into a special submission with the debtor for deciding a claim on the bill.⁶

398. What is the creditor's remedy under the statute after the six years have run ?

Ordinary action at his instance against the debtor, founded not on the bill, but on the debt, in which he must prove by the debtor's writ or oath (1) the constitution of the debt, and (2) that it is resting-owing.

399. Is the prescription applicable to a claim by the acceptor against the drawer, for whose behoof the former had accepted and paid the bill ?

¹ Bell's Prin. 598.

11127 ; National Bank, 5th Dec. 1837, 16 S. 177.

² Bell's Prin. *ib.*

³ 19 & 20 Vict. c. 79, § 109.

⁵ Ross, 20th July, 1855, 17 D. 1144.

⁴ Douglas, Heron, & Co., M.

⁶ Vans, 14th June, 1816 F.C.

party has only the beneficial interest, and is not the nominal creditor in the bill, because there is no proper *non valentia* ; M'Neil, &c. (Hannay's Trs.), 31st Jan. 1823, 2 S. 174.

(*g*) In Gordon, M. 7532, it was held by the Lord Ordinary that citation within the six years was sufficient though they had expired before the case was called ; and though the rest of the interlocutor was altered, no observation seems to have been made on that part of it ; and it has been repeatedly found that citation within the forty years, though the day of compearance was beyond them, interrupted the long prescription. See Gilmour, M. 11133 ; Ainsley, M. 11232 ; M'Intosh, M. 11239.

No ; because such a claim is a separate debt arising from an advance of money by which the bill was extinguished.¹

400. Is the production of a bill, in an action at the instance of the debtor's tutors, for obtaining authority to sell his estate to pay off debt, sufficient to save the bill from prescription ? State the reason.

No ; because the object of such a process is not to pay the debtor's obligations, but to satisfy the Court as to the necessity of a sale.^{2(h)}

401. What is the effect as to prescription of markings on the bill of the payment of interest before or after the expiry of the six years ?

(1.) Markings of the payment of interest, whether by the debtor or creditor, before the expiry of the six years, have no effect in interrupting the prescription.

(2.) Such markings, if made by the debtor after the six years, are sufficient.(i) [See Drummond, 7 R. 452, where held that a debt instructed by holograph markings by debtor on the promissory-note, and holograph entries by him in cash-books, was resting-owing more than thirty years after the date of the last entry.]

(3.) But if in the handwriting of the creditor, they are of no avail.³

402. Is the prescription elided by pleading compensation on a bill in defence against another debt ; or by producing a bill in a suspension of a threatened charge on it ? State the reasons.

¹ Ralston, M. 1533.

³ Dickson Evid. i. 259 (§ 450).

² Ferrier, 9th July, 1811, F.C.

(h) The case of Ferrier, cited, referred to the triennial prescription, but the principle is equally applicable to the sexennial, the ground being that, to elide prescription, the claim must be made in an action in which decree can be got for, or effect given to, the debt.

(i) So are writings by persons authorised by the debtor, as entries of payment of interest in his books by his clerk ; Black, 16th Jan. 1823, 2 S. 118. Such markings preserve the bill only for six years after their date ; Horsburgh, 13th Feb. 1811, F.C. ; Ferguson, 7th March, 1811, F.C.

(1.) Pleading compensation on a bill in defence against another debt elides the prescription, as that is equivalent to raising an action on it.¹(*k*) But the mere concurrence of debit and credit is not enough ; compensation must be pleaded judicially.²

(2.) The production of the bill in a suspension of a threatened charge does not bar the prescription ; because to produce that effect the action or diligence must be at the instance of the holder of the bill.³(*l*)

403. Where an acceptor, on a reference to oath by the drawer or an onerous indorsee, depones that he signed the bill, but got no value ; Is that sufficient to prove the constitution ?

In a reference by the *drawer*, such an admission is not suffi-

¹ Ross, 20th July, 1855, 17 D. 1144.

² Dickson Evid. i. 253 (§ 437).

³ Galloway, M. 11122.

(*k*) So held, Sloan, 1st June, 1827, 5 S. 742. See Eddie, 5th July, 1855, 17 D. 1041, for circumstances in which the triennial prescription was held not to have been elided by judicial proceedings.

(*l*) It is hardly accurate to say that "the action or diligence must be at the instance of the holder of the bill ;" because in pleading compensation, which, as above stated, is effectual, this is not the case. What is essential is that the claim be made judicially, either directly or in defence to another claim. Professor Bell (Com. i. 419) takes the same view as is stated in the answer as to the inefficacy of producing a bill in a suspension of a threatened charge, basing his opinion on the analogous case of a holograph bond where prescription was held not to have been so interrupted ; Wright, M. 11268 ; but there seems to be ground for doubting the principle of that decision, because it might lead to this anomalous result, that in a suspension raised for the very purpose of preventing a charge being given, the letters might be found orderly proceeded, and yet the creditor's claim be thereafter defeated by a plea of prescription. There seems no real distinction between producing the bill in such a suspension and producing it in defence in an ordinary action. The observations of the Lord President (M'Neill) in Ross, *supra*, note 1, appear to be as applicable to this point as to the one there raised. He said :—"We are still in the process in which the bill was produced before prescription had run, and in that view of the matter, parties having joined issue on the question whether the debt was compensated or not, and the bill being produced, perhaps only a few days old at the time it was produced, it would be a strange result if, the case going on, and not coming to a conclusion till after the lapse of the years of prescription, the parties should be met with the plea of prescription in the very investigation in which the bill was produced."

cient, because the oath disproves the alleged debt;¹ but in a reference by an *onerous indorsee*, who had acquired right to the bill during its currency, the qualification of the acceptor's admission that he got no value will not avail him; because the money was advanced on the faith of the acceptance, and it was therefore as much the acceptor's debt as if he had at first received the amount, and then handed it to his friend the drawer.² But it is doubtful whether this rule would now hold where the indorsee acquired right to the bill after the term of payment, as such indorsees are deemed to have taken the bill subject to all objections or exceptions to which it was exposed in the hands of the indorser.³

404. The years of prescription expired on 15th May, but the acceptor gave the holder of the bill, on 13th May, a holograph letter acknowledging the subsistence of the debt; Was the bill saved from prescription?

No; because the debt may have been discharged, and the statute presumes that it was discharged, before the full period of prescription had elapsed.⁴

405. When the acceptor himself, or his heir upon a reference, admits the constitution of the debt, Will it be sufficient to negative the resting-owing for the acceptor to depone generally that the debt has been paid, or for the heir to depone that he could not state whether it had been paid or not?

(1.) Where the acceptor admits the constitution, it is not sufficient, in order to negative the resting-owing, that he depone generally that the debt has been paid; he must depone specially as to the circumstances of payment, or at least state relevant grounds for his averment.⁵ (2.) But where the heir of the acceptor is sued, and, while admitting the acceptance, depones that he could not state whether the debt had been paid or not, prescription will operate; because the oath affords no proof of the resting-owing, in terms of the statute.⁶

¹ Agnew, M. 13,219; Drummond, 12th Jan. 1848, 10 D. 340.

² Dickson Evid. i. 256 (§ 444); Philip, M. App. "Bills," 9; Laidlaw, 31st May, 1826, 4 S. 636.

³ 19 & 20 Vict. c. 60, § 16.

⁴ Buchanan, M. 11128; Russell, M. 11130; Ferguson, 7th March, 1811, F.C.

⁵ Christie, 19th June, 1833, 11 S. 744.

⁶ Stirling, 11th March, 1817, F.C.

406. What is the effect of diligence against one of the acceptors within the six years, and proof by writ or oath of one of them after the six years?

(1.) Action or diligence against one of the acceptors within the six years perpetuates the debt against all the acceptors for forty years; because the prescription is thereby interrupted, and the *document* protected against the limitation.¹(*m*). (2.) But proof by writ or oath of one of them establishes the debt only against himself, and not against the co-obligants; because after the six years the document is gone, and it is the *debt* that must be proved, which can only be done by the writ or oath of each as against himself.²

[407. What is a crossed cheque? Mention the different kinds of crossed cheques at present in use?

A crossed cheque is a cheque with writing across the face, limiting the manner in which it is to be paid. Under the Crossed Cheques Act, 1876, 39 & 40 Vict. c. 81, there are three different kinds of crossed cheques:—(1) A cheque “crossed generally;” that is, bearing across the face an addition of the words, “*and company*,” or any abbreviation thereof, between two parallel transverse lines, or two parallel transverse lines simply. Such a cheque is only payable by the banker upon whom it is drawn to a banker. (2) A cheque “crossed specially;” that is, a cheque bearing across the face the name of a banker. Such a cheque is only payable to the banker to whom it is crossed, or to his agent for collection, and may be again “crossed specially” by the banker by whom it is crossed to another banker, his agent for collection. (3) A cheque “crossed generally,” or “crossed specially,” to which a lawful holder has added the words, “not negotiable.” A person receiving such a cheque has not, and cannot, give a better title to it than the person from whom he received it had.]

¹ Gordon, M. 7532.

174; M'Indoe, 18th Nov. 1824, 3 S.

² M'Neill, 31st Jan. 1823, 2 S. 295.

(*m*) So, where an annual rent was secured on two separate tenements, diligence against the one interrupts prescription as to the other; Balmerino, M. 11254; and where a right is held *pro indiviso* by several creditors, interruption by one benefits all (Napier, 697); but where a debt has been divided by assignation, interruption as to one part does not apply to the rest (Ersk. 3, 7, 47); and so as to apprising conveyed to different parties; Clerk, M. 11275.

VIII. PERSONAL DILIGENCE.

(1.) *Execution against the Person.*

408. What were the legal fictions resorted to for obtaining execution against the person for civil debt in Scotland and England respectively?

The ancient common law of both countries, upon feudal principles, denied personal execution at the instance of one subject against another, for a debt merely civil; the imprisonment of a debtor having been regarded as unjust to his superior, who had a higher interest than creditors in the person of the vassal. But, on the other hand, the superior's claim yielded to the commands of the sovereign, the paramount feudal superior of the whole country. Accordingly, in Scotland, when the debtor had been ordained, at the suit of the creditor, by the king's judges, and charged in the sovereign's name to pay the debt, his disobedience was held to be an act of rebellion; and that is the fiction upon which imprisonment for debt in Scotland is founded. In England, the creditor commenced the process of attachment against his debtor by making a fictitious complaint against him of forcible trespass; and this being an offence punishable by imprisonment, the creditor obtained a writ against the debtor called *capias ad respondendum*, which forced him to appear and find bail; and, after the action had been commenced on this fiction, the creditor proceeded, in the same suit, to prosecute for the debt for which, if he was ultimately successful, he obtained against the debtor a writ of execution called *capias ad satisfaciendum*.¹

409. What was the earliest kind of diligence against the person in Scotland?

With the exception of the caption issued by ecclesiastics against persons excommunicated,² the earliest execution for payment of debt in Scotland is the Act of Warding by the magistrates of royal burghs, introduced by Robert I. for the encouragement of merchants. It is a direct warrant for the imprisonment of a debtor on failure to pay the debt after a charge upon the magistrates precept.³ Beyond the burgh the earliest writ of personal execution,

¹ Ross Lect. i. 245 *et seq.*; Menzies Lect. 275 (284).

² See Ans. 208.

³ Kames' Law Tracts, 357.

with the exception previously adverted to, was Letters of Four Forms, issued originally upon obligations *ad facta præstanda*, and afterwards on liquid debts. The writ proceeded in the sovereign's name, and contained a warrant for giving the debtor four successive charges, the injunction of the last being "to perform his obligation, or to surrender his person to ward, under the penalty that otherwise he should be denounced rebel."¹

410. What are letters of horning?

"Letters of horning mean a letter from the king ordering or commanding the debtor to make payment under the pain of being proclaimed a rebel. The service of this letter upon the debtor is a *charge of horning*. If the debtor disobey the charge he is denounced or proclaimed a rebel; and, because of old a horn served the same purpose in proclamations that trumpets do at present, therefore the said letter has by custom, though improperly, obtained the name of *letters of horning*, and the service of the letter has obtained the name of a charge of horning."—LORD KAMES.²

411. Explain the passage in signet letters, "delivering them by you, duly executed and indorsed, again to the bearer."

The letters are addressed to messengers-at-arms, conjunctly and severally, who are enjoined, after executing them, to deliver them back duly indorsed, *i.e.*, having the execution written on the back, to the bearer, *i.e.*, the creditor-raiser of the letters.³

412. In what cases do hornings conclude with the words, "*Per decretum dominorum concilii*," and with the words "*Ex deliberatione dominorum concilii*?" Explain the reason.

Hornings on decrees of the Court of Session, at the pursuer's instance, pass *de plano*, without a bill; (*n*) and, therefore, the letters conclude with the words "*Per decretum dominorum concilii*."

¹ Kames' Law Tracts, 358; Menzies Lect. 291 (300).

² Kames' Law Tracts, 362.

³ Ross Lect. i. 297.

(*n*) Where a warrant to charge as furth of Scotland is required, a bill is in all cases necessary, and also where there is a mandatory whose name does not appear in the decree, and generally where the horning proceeds on more than one writ.

But hornings at the instance of an assignee, or upon decrees of inferior judges, and other hornings which pass upon a bill, bear "*Ex deliberatione dominorum concilii*," alluding to the consideration which the Court is supposed to take of the bill when presented before granting the desire of it by the *fiat ut petitur*.¹

413. What was the method formerly in use for procuring personal execution upon decrees of Inferior Courts?

Personal execution, being an extraordinary remedy, required the special interposition of sovereign authority, which was obtained by an order directed to the keeper of the King's Signet, issuing from His Majesty's Supreme Courts. But as Inferior Judges could not give warrant for letters passing the signet, it was necessary to exhibit the decrees of such judges judicially before the Court of Session, and obtain a *decree-conform*, which, being a decree of a sovereign court, was a proper foundation for letters of horning. The necessity for a decree-conform was obviated in the case of decrees of magistrates within burgh, by the Act 1593, c. 184; and the provisions of that statute were subsequently extended to the decrees of other inferior judicatories.²

414. What steps were necessary to obtain personal execution upon a decree of the Court of Session before the Personal Diligence Act?

(1.) Letters of horning were expedite on the decree at the creditor's instance.

(2.) The debtor was charged on the horning to pay the debt within the days of charge, usually fifteen, under the pain of rebellion and being put to the horn.

(3.) Within a year and a day of the date of the charge, the debtor was denounced rebel, and put to the horn at the market-cross of the head burgh of the shire of his residence.

(4.) The horning and execution were registered within fifteen days in the Register of Hornings.

(5.) The registered horning and executions were produced in the Bill Chamber, with a bill for letters of caption, which was passed "because the Lords have seen the registered horning."

(6.) The fiat on the bill was the authority for expediting letters

¹ Ross Lect. i. 268.

² Kames' Law Tracts, 368 *et seq.*

of caption, which, when signeted, was the warrant of imprisonment of the debtor.¹

415. What is the procedure for obtaining a warrant for the imprisonment of the debtor on a Court of Session decree?

(1.) The debtor is charged to pay the debt, the decree containing a warrant for that purpose.

(2.) Within a year and a day after the charge has expired, the extract and execution of charge are presented to the keeper of the General Register of Hornings, who records the execution, and writes a certificate of registration upon the extract, and also upon the execution, if it be written upon paper apart.

(3.) A minute for warrant of imprisonment is then indorsed on the extract, and signed by a Writer to the Signet.

(4.) The extract, with the execution and certificate of registration, and indorsed minute, are presented in the Bill Chamber, and the clerk writes on the extract, and subscribes this deliverance "*Fiat ut petitur*," which is the warrant of imprisonment.²

[416. What is the present state of the law as to imprisonment for civil debt?

By the Debtors (Scotland) Act, 1880, it is provided that (except as therein set forth) after 1st January, 1881, no person shall be apprehended or imprisoned for civil debt. The exceptions are shortly—(1) Taxes, rates, &c. ; (2) Sums decerned for aliment. But in any of the cases excepted under § 4, no one can be imprisoned for more than one year. (3) Imprisonment on a *fugæ* warrant ; and (4) under a decree or obligation *ad factum præstandum*, is still competent. (5) A debtor in a sequestration or *cessio* may be imprisoned, if convicted of a crime and offence, in any of the cases detailed in § 13 of the Act.]

417. What were the effects of denunciation before the Act abolishing heritable jurisdictions?

(1.) The denounced debtor's moveable estate fell to the Crown, as single escheat, but under burden of payment of the debt contained in the creditor's diligence.

(2.) The liferent escheat was incurred, being a forfeiture to the

¹ Ross Lect. i. 301 *et seq.*

² 1 & 2 Vict. c. 114, §§ 1, 5, 6.

superior of the rents and produce of the debtor's heritable estate, if he remained unrelaxed from the horn for a year and a day.

(3.) The debt and interest for which the debtor was charged were accumulated so as to bear interest.^(o)

(4.) The denounced debtor became subject to imprisonment.¹

418. What was the statutory effect of a registered charge on an extract-decree, and of the incarceration of the debtor?

(1.) The registration in the Register of Hornings of a charge on an extract-decree had the same effect as if the debtor had been denounced rebel in virtue of letters of horning; and the letters, with the execution of charge and denunciation, had been recorded according to the forms formerly in use, and the debt and interest were thereby accumulated into a capital sum, on which interest thereafter became due.²

(2.) The incarceration of the debtor under diligence had the effect of rendering the debtor notour bankrupt under the Act 1696, c. 5.³

419. Where a creditor instead of proceeding against his debtor by charging him on the extract-decree, and following out the other procedure introduced by the Personal Diligence Act, adopts the former method of letters of horning; Is the expense of the diligence exigible from the debtor?

No part of the expenses of the diligence is recoverable from the debtor, except the expenses of the extract, unless it be shown that it is incompetent to proceed in the way provided by the Personal Diligence Act.⁴

420. What are the different modes of executing a charge against an individual debtor of full age?

(1.) By delivering a copy of the charge to the debtor personally apprehended.

¹ Ersk. 2, 5, 58 *et seq.*

² 1696, c. 5; Ersk. 4, 1, 41.

³ 1 & 2 Vict. c. 114, § 5.

⁴ 1 & 2 Vict. c. 114, § 8.

(o) In order to produce this effect, denunciation required to be made, not at Edinburgh, as the *commune forum*, which for other purposes was sufficient, but at the market-cross of the head burgh of the jurisdiction within which the debtor resided; 1592, c. 128; 1597, c. 268; 1621, c. 20; Cochrane, Kames' Rem., Dec. ii. p. 70. The recording of the execution has now the same effect, 1 & 2 Vict. c. 114, § 5.

(2.) By leaving the copy charge for the debtor within his dwelling-house, with his servant, to be given to him, if the messenger could not find him personally.

(3.) By affixing and leaving copy for the debtor, upon the most patent gate or door of his dwelling-house, after six audible knocks by the messenger upon the gate or door, if he could neither get access to the house, nor find the debtor personally.¹

(4.) By delivering the copy at the office of the keeper of the Record of Edictal Citations, if the debtor is furth of Scotland.²

[421. What is the present form of warrant of execution on registered writs, protests, &c. ?

“And the said Lords grant (*or* the Sheriff grants, or *as the case may be*) warrant for all lawful execution hereon,” 40 & 41 Vict. c. 40, schedule.]

422. What are the *induciae* of a charge upon, (1) a registered bond ; (2) a registered protest ; (3) a decree of the Court of Session ; (4) a decree of the Teind Court ; (5) Exchequer-warrants in favour of the Crown ; (6) a horning against superiors ; the person charged being resident in Scotland ?

(1.) On a registered bond, six days, if containing a consent to that effect ; (*p*) without a consent, fifteen days ; on a bond and disposition in security, six days, although not containing a consent.

(2.) On a registered protest, six days.

(3.) On a decree of the Court of Session, fifteen days.

(4.) On a decree of the Teind Court, ten days.

(5.) On Exchequer-warrants in favour of the Crown, six days.

(6.) On a horning against a superior *nominatim*, fourteen days ; against superiors generally, twenty-one days.

¹ Ross Lect. i. 303.

² 13 & 14 Vict. c. 36, § 22.

(*p*) A *formal* consent is not now necessary. See note (*c*), p. 99.

By 19 & 20 Vict. c. 56, § 38, it is declared that “all bonds or obligations granted, or that may be granted, to Her Majesty, albeit not containing any clause of registration, shall be capable of registration in the Books of Council and Session, or other judges’ books competent, and to have a decree interponed thereto, and to be extracted, with a view to execution in the like manner as if a formal clause of registration had been contained therein ; and all diligence and execution shall be competent thereon in the like manner and to all effects as upon any bond containing such formal clause of registration.”

423. Is a charge valid at the instance of a foreigner without a mandatory?

Such a charge is valid ; it being sufficient to sist a mandatory, if it be suspended.¹ But it may be essential to conjoin a mandatory with a foreign creditor in the warrant where the diligence proceeds on a bill ; because that is of the nature of a petition to the Court.²

424. What is the effect of a charge at the instance of a company, where none of the partners are named in the warrant?

(1.) Where the company has a proper company firm the charge is valid.³

(2.) Where the company has a descriptive firm the charge is null.⁴

(3.) Unless it be a corporation, in which case the charge is valid.⁵

425. What is the effect of a charge at the instance of the whole partners, without naming the firm, on a warrant in favour of a company, and the partners *nomination*?

The charge is invalid ; as it is an unauthorised deviation from the warrant.⁶

426. May a partner be validly charged on diligence against the company in which he is not named?

Yes ; it being the duty of the messenger to discover who are the partners of the company.⁷

427. Was a debtor, imprisoned on letters of caption, formerly entitled to liberation with the creditor's consent? State the reason.

The creditor's consent was not sufficient to liberate an imprisoned debtor, because he was incarcerated on the caption, not as a debtor, but as a rebel ; and, accordingly, it was necessary for him,

¹ Ross, 8th March, 1849, 11 D. 984.

² Cook, 26th Nov. 1850, 13 D. 169, p. Lord Wood.

³ Forsyth, 18th Nov. 1834, 13 S. 42.

⁴ Forsyth, *ib.*

⁵ Bell's Prin. 2169.

⁶ Craig, 23rd Nov. 1841, 4 D. 54.

⁷ Knox, 12th Nov. 1847, 10 D. 50.

in order to his liberation, to obtain letters of relaxation. But by modern practice the debtor is entitled to his freedom on payment of the debt, or upon consigning the amount in the hands of a magistrate.¹(*r*)

428. What circumstances bring into effect the Act of Grace ; and what is its effect ?

When a prisoner for a civil debt or cause is unable to maintain himself, he is entitled, under the Act of Grace, to apply to the magistrates for an order upon the creditor to give him aliment, and if the latter refuse or delay for the space of ten days after intimation of the application to provide aliment, the debtor is entitled to liberation ;² after which he cannot be again apprehended on the same warrant, unless there be a change of circumstances,³ or unless the debtor has been liberated through error imputable to himself.⁴ [But see remarks by Lord President Inglis in *Forgie*, 3 *Rettie*, 1149, where re-incarceration allowed without a change of circumstances.]

429. What is the object of the bond of presentation ; and what is the nature of its obligatory clauses ?

The object of the bond of presentation is to allow a debtor who has been apprehended at the suit of a creditor time for making an arrangement, instead of going directly to prison. It is granted by a friend of the debtor, and he binds himself that the debtor shall, at a specified time and place, appear in the same condition, without any suspension, sist or protection(*s*) which might prevent the execution of the creditor's diligence ; and, in case of failure, the obligant binds himself to pay the debt, with interest and expenses.⁵

430. What circumstances will excuse an obligant in a bond of presentation from presenting the debtor ?

¹ Kames' Law Tracts, 373 ; Menzies Lect. 291 (300).(*q*)

² 1696, c. 32.

³ Mackenzie, 14th Jan. 1830, 8 S. 306.

⁴ Pender, 28th Jan. 1846, 8 D. 408 ; White, 24th Nov. 1858, 21 D. 28.

⁵ Ross Lect. i. 353 ; Menzies Lect. 292 (301) ; Jur. St. ii. 442.

(*q*) Forbes, 31st Jan. 1823, 2 S. 169.

(*r*) Or by consent of the incarcerating creditor or creditors.

(*s*) See, as to this, Cheyne, 20th June, 1863, 1 M'P. 960.

(1) The bond is satisfied and the cautioner freed by the debtor's death. (2) Serious illness is a sufficient excuse, provided the debtor is presented when he has recovered. (3) It has been held that imprisonment on another caption will not excuse the obligant, because the impediment to presentation is imputable to the debtor himself,¹ but this is doubted by Professor G. J. Bell, on the ground, that "the creditor has all the benefit that he could have had by himself imprisoning the debtor, there being no preference by priority of personal execution;"² and he holds that the obligant will be released if he give notice of the place of confinement.³ (4) The obligant will not be released by the debtor's enlistment,⁴ nor by his betaking himself to the sanctuary.⁵

(2.) *Poinding.*

431. What are the warrants of poinding?

(1) Letters of horning and poinding; (2) extract decrees, registered bonds, or registered protests; (3) Sheriffs' precepts; (4) Exchequer-warrants.⁶

432. Where a year has elapsed from the date of the charge, is it necessary to give a new charge in order to obtain a warrant for the imprisonment of the debtor or to poind his effects?

(1) The execution of charge, in order to obtain a warrant of imprisonment, must be registered within a year and day after the charge has expired, and therefore a new charge is necessary if registration has not been made within the year;⁷ (2) but poinding may proceed even at a distance of years after the charge.⁸

433. Before the Personal Diligence Act, when access was not obtained for the purpose of poinding, what was necessary to be done?

When access to the goods was not obtained, the messenger returned an execution to that effect, and upon the production of the

¹ Polstead, M. 1807.

² Bell's Com. i. 402.

³ Bell's Prin. 277.

⁴ Henderson, M. 1809.

⁵ Douglas, 17th Dec. 1842, 5 D. 338.

⁶ Ersk. 3, 6, 20; Bell's Prin. 2286.

⁷ 1 & 2 Vict. c. 114, § 5.

⁸ Kerr, 30th May, 1837, 15 S. 1041.

diligence and execution in the Bill Chamber, warrant was obtained for letters of open doors, which passed the Signet, of new charging messengers to poind, and, if needful, to make shut and lock-fast places open and patent.¹

434. What subjects cannot be poinded?

(1) Ships, it is said, cannot be poinded; (t) but this is doubted by Professor G. J. Bell;² (2) effects in the Palace of Holyrood House;³ (3) wheat merely braided, and clover grass;⁴ (4) plough goods—being horses, oxen, implements of husbandry, and other goods pertaining to the plough—are not poindable during the season of labour, if the debtor has other effects;⁵ (u) (5) goods of which the debtor is only joint proprietor;⁶ (6) goods in which he has only a qualified or temporary interest;⁷ (7) debts;⁸ (8) it is a matter of doubt whether bills and bank-notes are poindable;⁹ (v) under the Court of Exchequer Act it is lawful to poind for crown debts every description of the debtor's moveable effects, including bank-notes, bills, implements of husbandry, &c.¹⁰

435. Can a sale be stopped by an arrestment used in the hands of the owner of the poinded effects, by the creditors of the poinding creditor, after warrant of sale is obtained? State the reason.

No; because the proceeds being consigned with the clerk of court, the claims of the arresting creditors would be in no degree affected.¹¹

¹ Menzies Lect. 296 (305).

² Bell's Com. ii. 60.

³ Earl of Strathmore, 18th Feb. 1823, 2 S. 223, rev. 22nd Feb. 1826, 2 W. & S. 1.

⁴ Elder, 5th July, 1833, 11 S. 902.

⁵ 1503, c. 98; Ersk. 3, 6, 22.

⁶ Fleming, 2nd Dec. 1828, 7. S. 92.

⁷ Scott, 13th May, 1837, 15 S. 916.

⁸ Bell's Prin. 2288.

⁹ Bell's Prin. *ib.*

¹⁰ 19 & 20 Vict. c. 56, § 32.

¹¹ Anstruther, 22nd Feb. 1851, 13 D. 778.

(t) The usual mode of attaching ships is by arrestment and process of sale.

(u) The Act prohibits the poinding of those goods "quhair any other gudes or landes are to be apprised or poynded." See Wemyss, M. 10520.

(v) This question was raised in Hamilton, 12th June, 1741, Br. Sup. 5, 708; and in Alexander, 14th Feb. 1826, 4 S. 439, the report of which case bears—"Although the question of the competency of poinding bank-notes was fully argued by the parties, yet their Lordships did not deliver any opinion on that point, nor did they intend to decide it."

436. What is the procedure in executing poindings?

(1) The messenger goes along with two valuers to the debtor's dwelling-house, he cries three oyesses, reads the warrant, makes a schedule of the goods poinded, and of the value as fixed by the valuers on oath, and administered by him, offers three times the goods back to the debtor at the appraised value, and, on the debtor's refusal, adjudges, discerns, and declares the poinding to be completed, and the goods to belong to the creditor; the goods being left in the hands of the debtor, with a signed note of the value. (2) The messenger, within eight days, reports the poinding to the Sheriff, who then grants warrant for a sale, betwixt eight and twenty days after publication of the notice of sale, six days' notice of the sale being given to the debtor, or other possessor. The goods cannot be sold for less than the appraised value, at which they are delivered to the creditor, if the appraised value be not offered at the sale. The sale, or delivery, is reported to the Sheriff within eight days; and if a sale has taken place, the roup roll, and accounts of the proceeds, must at same time be lodged. The Sheriff then orders the proceeds to be consigned with the clerk, and the amount paid to the creditor to the extent of his debt, interest, and expenses.¹

437. If the debtor were to allege that the goods are not his property; or, a third party appeared and claimed the goods; or, a third party, in circumstances indicating collusion, produced a written conveyance to them in his favour; Ought the messenger, in any of these cases, to stop the poinding?

¹ (1.) Where the debtor alleges that the goods are not his property, that will not stop the poinding.

(2.) Where the goods are claimed by a third party, the messenger may take his oath, and interrogate him in order to discover to whom the property belongs; and if it shall appear that the claim is collusive, he may proceed with the poinding.

(3.) Where a third party produces a written conveyance, and supports it with his oath, although there are indications of collu-

¹ Ersk. 3, 6, 24; Menzies Lect. 298 (307); 1 & 2 Vict. c. 114.

sion, the messenger must stop the poinding; because he cannot judge of the effect of the deed.¹(x)

438. Must the poinded effects, in all cases, be left where poinded? State the reason.

The Personal Diligence Act provides that the poinded effects are to be left with the person in whose possession they were when poinded;² but in poindings of Crown debtor's effects, it is by the Court of Exchequer Act declared to be lawful for the officer, where it is deemed expedient, to take possession of the poinded effects, and to put them in a place of security, instead of leaving them with the person in whose possession they were poinded.³

439. Does the appraisement require to be stamped?

Not unless licensed appraisers are employed, which is not necessary.⁴(y)

440. The sale was advertised on the 10th, and appointed for the 18th of November; Is that a sufficient compliance with the requirements of the Act?

¹ Ersk. 3, 6, 26; Breadalbane, M. 10522.

² 1 & 2 Vict. c. 114, § 24.

³ 19 & 20 Vict. c. 56, § 36.

⁴ Drummond, 25th Nov. 1824, 3 S. 311.

(x) The case of Breadalbane, cited, was an action of spuilzie, on the allegation that the messenger had refused to accept the party's oath, having required him also to depone whether the disposition "was for onerous causes or simulate," which the party refused to do, and which the Lords found to be a spuilzie. The reporter adds—"But it were fit that the Lords, for clearing the lieges, would determine the point how far a messenger's power may reach in trying the simulation of all such dispositions produced before them, else all poindings on the production thereof may be stopped."

(y) This point was not decided in the case cited (Drummond). There was no separate appraisement, but there were two executions, the first of which was objected to as not being signed by the appraisers, and the second as being unstamped. It was held that the execution did not require a stamp. In the course of the processes the opinion of the Solicitor of Stamps was taken, and he stated "that he did not consider that the instrument of execution of poinding itself required a stamp, but that appraisements incidental to or occurring in the legal diligence of poinding did so." The question would probably turn on there being a separate appraisement rather than on the persons employed to make it.

Yes ; the Act does not require eight *free* days to intervene, as was the case under the old practice.¹

441. When a creditor, after taking steps to recover his claim by poinding, finds that another creditor will be able to complete his diligence before him, What steps ought he to take in order to obtain a share of the effects ?

(1) If he is in possession of a warrant of poinding, he may be conjoined in the poinding at the instance of the other creditor, before it is completed, on exhibiting and delivering the warrant to the officer ;² or (2) he may use such personal diligence against the debtor as will render him notour bankrupt under the Act 1696, c. 5, or the Act 54 Geo. III. c. 137 ; by the latter of which (§ 5)(z) it is enacted, that no poinding within sixty days before, or four months after the bankruptcy, shall give a preference, but every creditor of the bankrupt having liquid grounds of debt, and summoning the poinder, or claiming in a judicial process or competition before the four months have elapsed, shall be entitled to a proportional share corresponding to his debt ; or (3) he may obtain a sequestration of the debtor's estates under the Bankrupt Act, which renders ineffectual any poinding executed on or after the sixtieth day before the sequestration.

442. In a competition betwixt the Crown on a writ of extent and a poinding creditor, What is the rule of preference ?

The Crown writ of extent is preferable to the diligence of the subject, unless the latter be completed before issuing the extent.³(a)

¹ M'Neill, 13th Feb. 1841, 3 D. 554.

² 1 & 2 Vict. c. 114, § 23.

³ Menzies Lect. 302 (311).

(z) This Act repealed by 19 & 20 Vict. c. 79, and the provision re-enacted by 19 & 20 Vict. c. 79, § 12.

(a) See Borthwick, 5th Dec. 1862, 1 D. 94. Here a bankrupt was sequestrated, the first deliverance on the petition being dated 12th May. On 15th May a charge was given against the bankrupt at the instance of the Crown (which under 19 & 20 Vict. c. 56, § 42, is equivalent to the teste of a writ of extent). Held that the diligence was effectual against the trustee, the provisions of the Bankrupt Statute having no application against the Crown.

443. Where goods have been sold but not delivered, Can the seller retain or attach the goods for the price, or for a separate debt due to him by the purchaser, as against a party who has purchased the goods from the latter?

The seller is entitled to retain the goods for the original price, but not for a separate debt due to him by the first purchaser.¹ (b) But the original seller may attach the goods while in his own possession, by arrestment or poinding, at any time prior to the date when the sale of the goods to a subsequent purchaser was intimated to such original seller; and the arrestment or poinding has the same effect in a competition as an arrestment or poinding by a third party.²

444. In a competition betwixt an arrester and a poinder, Who will be preferred?

The poinder will be preferred; because poinding is a perfect diligence operating at once as a transference, while an arrestment merely creates a *nexus* on the property, leaving the right still in the debtor. But if the arrester has obtained decree of furthcoming before the execution of poinding, he will be preferred.³

¹ 19 & 20 Vict. c. 60, § 2.

³ Bell's Com. ii. 61 and 69.

² *Ibid.* § 3.

(b) It is to be observed, however, that the Act contains a *proviso* that nothing therein "contained shall prejudice or affect the right of retention of the seller" "for performance of the obligations or conditions of the contract of sale," "or any such right of retention arising from express contract with the original purchaser" (§ 2); so that there may be grounds of retention other than the price.

In Wyper, 20th Feb. 1861, 23 D. 606, it was held that the Act does not cut down the right of the seller to retain in security of a general balance as against the trustee in the purchaser's sequestration; and in Sim, 3rd June, 1862, 24 D. 1033, it was held that the Act did not apply to a sale of a horse not delivered, and of which the seller had, as a condition of the transaction, not only the custody, but the use, with power to sell it; and therefore that a poinding at the instance of a creditor of the seller was valid in a question with the purchaser, who had paid the price to another creditor, who had poinded the horse previously to the date of the transaction.

(3.) *Arrestment.*

445. What are the warrants of arrestment (1) when the debt is not liquid; (2) when it is liquid; (3) before the term of payment?

(1.) Where the debt is not liquid, warrant in a summons, letters of arrestment on dependence, or sheriff's precept.

(2.) Where the debt is liquid, letters of horning and poinding, letters of arrestment, sheriff's precept, extract-decree, extract-registered bill, protest, or other registered obligation, and Exchequer-warrants.

(3.) Before the term of payment, letters of arrestment on a liquid obligation, the debtor being *vergens ad inopiam*.¹ [Arrestment cannot be used in security of a future debt unless upon the allegation that the debtor is *vergens ad inopiam*; Lord President Inglis, in Symington, 3 R. 206.]

446. Is the general warrant in a summons sufficient for the arrestment of a ship?

It is usual, in practice, to obtain a special warrant from the Lord Ordinary on the Bills to arrest a ship; but the ordinary general warrant in a summons is sufficient for that purpose.^{2(c)}

447. What is necessary to make arrestment on dependence effectual?

The summons must be executed within twenty days of the execution of arrestment, and called within twenty days after the diet of compearance; or, where the expiry of that period falls within vacation, or previous to the first calling day in the next session, the summons must be called on the first calling day thereafter.³

448. What is necessary to attach a fund belonging to a foreign debtor?

¹ Ersk. 3, 6, 10; Menzies Lect. 303 (311) *et seq.*

² Clark, 17th June, 1853, 15 D. 750.
³ 1 & 2 Vict. c. 114, § 17.

(c) Some doubt is entertained how far this warrant is sufficient authority to *dismantle* the ship. See Clark's case, cited.

(1.) The fund is, in the first place, arrested on letters of arrestment *ad fundandam jurisdictionem*, the object of which is to subject the foreign debtor to the jurisdiction of the Court.¹

(2.) A summons founded on the arrestment is then raised in the Court of Session, on which the creditor executes an arrestment on dependence.^(d) It was said in one case,² that arrestment *ad fundandam jurisdictionem* imposes a *nexus* on the fund, but Professor Menzies recommends, as an act of prudence, the continuance of the established practice.³ In a late case, in the House of Lords, the question was raised, but not decided, whether a decree in an action where jurisdiction is founded on arrestment can be executed beyond the value of the goods arrested.⁴^(e) [See as to value necessary to be arrested to found jurisdiction, Shaw, 7 M'P. 449, Ross, 5 R. 1013. In the former case, a debt to the amount of £1, 8s. 6d., and in the latter a balance of interest of 9s. 3d. due by a bank, was held enough.]

¹ Ersk. 1, 2, 19.

³ Menzies Lect. 304 (314).

² White, 30th June, 1846, 8 D. 952.

⁴ London and N.-W. Rail. Co., 22nd Feb. 1858, H. of L. 20 D. 4.

^(d) This is the mode of proceeding where it is necessary to *constitute the debt* as well as to attach the fund; but if the debt be already constituted by decree or bill and registered protest, there is no necessity for founding jurisdiction. See 1 & 2 Vict. c. 114 (Diligence Act), and schedule annexed. In the Juridical Styles, iii. 705, it is stated that where a horning on a recorded protest against a foreigner is applied for, it must be preceded by an arrestment to found jurisdiction; but there seems to be no necessity for this. The object of founding jurisdiction is to make the party amenable to the Court so as to get a valid decree against him; but where a decree has been already got, no such proceeding is necessary to authorise its being put in force. In the case of a decree obtained in an action this is quite clear, and the right of the holder of a bill by a foreigner to apply for horning rests on the assumption that he is in possession of a valid decree by means of the registered protest. If the authority following on the founding of jurisdiction be required at all, it is for the recording of the protest, because it is thereby that the Court is held to pronounce decree and to grant warrant, after which diligence may follow in the usual course; but no such authority seems to be required, because "bills are by statute registrable just as if they contained a clause of registration." See observations of the judges in Burns, 18th July, 1844, 6 D. 1852; and Mackenzie, 12th Dec. 1854, 17 D. 164.

^(e) The question was alluded to, but not raised, for which there was no opportunity.

449. In what cases is it unnecessary to arrest *ad fundandam* before instituting legal proceedings against a foreigner?

(1.) A foreigner may be called without a previous arrestment *ad fundandam* in a process of multiplepoinding, the existence of the fund being equivalent to such arrestment.¹(f)

(2.) Where a foreigner is the pursuer in an action before the Court of Session, the defender may raise a counter-action against him without arresting *ad fundandam*; the foreigner in that case being subject to the jurisdiction of the Court, on the principle of reconvention.²(g)

(3.) Where a foreigner is possessed of heritable property in Scotland, he may be sued with reference to it without a previous arrestment *ad fundandam*; on the principle that the *locus rei sitæ* is the only place where rights regarding heritage can be tried, and the proprietor is presumed to have employed some one there to look after it in his absence.³(h)

[450. Arrestments to found jurisdiction against a defender domiciled in England were used in the hands of A. W.

¹ Crockart, 9th Dec. 1852, 15 D. 202.

² Ashton, M. 4835.

³ Ersk. 1, 2, 18.

(f) This point was not raised, though it was referred to in the case of Crockart, cited; but it had been so held in Miller, 23rd June, 1838, 16 S. 1204. Appearance of a foreigner as claimant in a multiplepoinding does not create jurisdiction against him, or render arrestment *ad fundandam* against him unnecessary; Bell, 4th June, 1852, 14 D. 837.

(g) This rule is not universal. One Englishman obtained a judgment of the Court of Queen's Bench against another, who thereafter came to reside in Scotland. The plaintiff in that suit then raised an action in the Court of Session, concluding for decree conform. During the dependence of this action, the defender raised an action of damages in Court of Session against the pursuer for assault and slander, pleading reconvention. Held that the Court of Session had no jurisdiction; Thompson, 25th Jan. 1862, 24 D. 331. See also M'Ewan's Tra., 9th March, 1852 (reported 17th Dec. 1852), 15 D. 265, where the plea of reconvention was not, and Baillie, 17th Dec. 1852, 15 D. 267, where it was, sustained.

(h) The jurisdiction in such cases is not limited to actions with reference to the property, but extends to ordinary personal actions, and where the party is a trustee, to such actions against him *qua* trustee; Ferrie and Fairley, 30th June, 1831, 9 S. 854; Kirkpatrick, 23rd June, 1838, 16 S. 1200; but interest in heritable property, as a beneficiary under a trust-deed, does not found jurisdiction; Bell, 4th June, 1852, 14 D. 837.

to attach sums due and addebted by him to the defender. A. W. was not individually addebted to the defender, but the firm of A. W. & Co., of which he was one of the partners, was owing a sum to the defender. Was the arrestment good?

No; because the company, which had more than one partner, being in law a separate person, was the debtor; Hay, 7 R. 972.]

451. What is the effect of an arrestment in the hands of (1) a clerk for a debt due by his employer; (2) trustees for creditors for a debt due by the trustor; and (3) a testamentary trustee and executor for a debt due by the deceased?

(1.) Arrestment in the hands of a clerk is null, because he is in law identified with his employer, and can have no claim of retention against him.¹

(2.) An arrestment in the hands of a trustee for creditors is null; because the trustee does not represent the granter of the trust, but holds for the creditors themselves, on each of whom a vested interest in a share of the funds proportioned to his debt is conferred by the trust-deed.² [But see Nicolson, 11 M.P. 179. An insolvent granted a trust-deed for behoof of creditors, and the trustee entered into possession. A creditor who had not acquiesced in the trust-deed used arrestment in the hands of the trustee. Thereafter, within sixty days of the date of the trust-deed, the debtor was made notour bankrupt. More than four months after notour bankruptcy, he was sequestrated. It was held that the creditor had secured a preference by his arrestment in the hands of the private trustee. Lord President Inglis:—"If the trust-deed were good, and not liable to be cut down, then the arrestments would attach nothing but the reversion after exhausting the purposes of the trust-deed. If the trust-deed became bad, the arrestments became effectual to attach all the goods which *de facto* were in the hands of the trustee."]

(3.) An arrestment in the hand of a testamentary trustee and executor is valid; because he holds not as a trustee for creditors, but as representing the deceased, and so all action and diligence is

¹ Bell's Com. ii. 70.

11 D. 618, aff. 15th Aug. 1850; 7

² Globe Ins. Co., 16th Feb. 1849, Bell's App. 296.

as competent against him as they would have been against the trustor himself.¹

452. What is the method of executing an arrestment in the hands of a party furth of Scotland, and what is the effect of such an arrestment?

Arrestment in the hands of a party furth of Scotland is executed by delivery of a schedule at the Record Office of Citations of the Court of Session;² and notice of the arrestment ought to be given to the agent of the arrestee. The arrestee is not interpellated from paying to the original creditor, unless it be proved that he was in the knowledge of the arrestment.^{3(l)}

453. May the sum (1) in an heritable bond, and (2) in a policy of life assurance, be arrested?

(1.) The sum in an heritable bond, if registered, or followed by a recorded infetment, cannot be arrested; because arrestment is a diligence for attaching moveables. It has been held that the sum in an heritable bond, followed by an unregistered sasine, is arrestable.^{4(m)}

(2.) The sum in a policy of assurance is arrestable during the life of the party insured, and the arrestment will be effectual if he die before another premium becomes payable.⁵ It is doubtful whether the arrestment would subsist after the payment of another premium. [But see Bankhard, 9 M'P. 443, where it was held by

¹ Globe Ins. Co., *supra*. (i)

⁴ Stewart, M. 705.

² 1 & 2 Vict. c. 114, § 18.

⁵ Strachan, 19th June, 1835, 13 S.

³ 54 Geo. III. c. 137, § 3.(l)

954.

(i) See also Swayne, 8th June, 1822, 1 S. 479.

(l) See on this point Leslie, 29th Nov. 1827, 6 S 165. The 54 Geo. III. is repealed, and the provision referred to is now contained in 19 & 20 Vict. c. 91, § 1.

(m) By the Act 1661, c. 51, it is declared that "all sums due by bonds, &c., whereupon no infetment has followed, are and shall be arrestable," as well as comprisable; and the competition in Stewart's case, cited, note 2, was between an arrester and an adjudger, infetment having been taken on the bond before the date of arrestment, but not recorded within sixty days, in terms of the Act 1617. Such bonds, though not followed by infetment, are always heritable as to succession; Menzies, 3rd Dec. 1738, M. 5519, where the creditor in the bond died before the term of payment, and without taking infetment; and Hadaway, 25th May, 1830, 8 S. 800.

Lord Gifford that the interest held by a debtor in a mutual insurance company under a policy payable at his death might be validly arrested during his life, and that the arrestment did not fall by another premium becoming due after the date of arrestment.]

454. May a sum which is the subject of litigation be arrested in the hands of the defender, pending the suit? State the reason.

Such a sum may be arrested; because it is not a future debt, for the decree subjecting the arrestee in payment, when it is pronounced, draws back to the period when the debt first became due.¹

455. A creditor arrests before the death of the common debtor, and another confirms executor-creditor after his death; in a competition between the arrester and the executor-creditor, Who will be preferred? State the reason.

The executor-creditor will be preferred; not because the *nexus* of the arrestment is dissolved by death, but because confirmation is a more complete diligence than arrestment.² But arrestment for a Crown debt would be preferable to a subsequent confirmation; because such arrestment, it is declared, "shall operate to transfer to the Crown, preferably to all other creditors of the Crown debtor, all right to and interest in the arrested fund competent to the Crown debtor."³

456. What is the effect of an arrestment in the hands of a tenant on the term day?

The arrestment attaches the rent which is then due, and not the rent to become due on the following term, the term day being the last day of the half-yearly term.⁴(n)

¹ Ersk. 3, 6, 8; Wardrop, M. 4860.

² 19 & 20 Vict. c. 56, § 30.

³ Wilson, 26th June, 1823, 2 S.

⁴ Wright, M. 15919.

430; Menzies Lect. 311 (321).

(n) The same result would follow from an arrestment at any time during the currency of the term; Wright, M. 15919; Ersk. 3, 6, 9; Pindar, 27th May, 1824, 3 S. 69. Where the conventional term is postponed beyond the legal term of payment, the arrestment of rents is regulated by the latter; Handyside, 15th Jan. 1813, F.C.; Bell's Com. ii. 72.

457. What is the effect of the arrestment of the sum in a personal bond due to a wife for a debt due by the husband?

- (1) If the term of payment of the bond had elapsed before the marriage, the arrestment carries only the past and current interest; because it is only the interest which falls under the *jus mariti*.
 (2) But if the marriage took place before the term of payment, the arrestment carries the principal sum, as well as the interest; because in this case the bond itself is transferred to the husband by the marriage.¹

458. May the sum in the bond, before the term of payment, or the interest thereof for a term not yet current, be arrested?

- (1.) The sum in a bond may be arrested before the term of payment; because it is due although not yet payable. But (2) the interest for a term not yet current cannot be arrested; because it is neither payable nor due, it is a future debt.²

459. What subjects are not arrestable?

- (1) Funds heritably secured; because arrestment is a diligence for attaching moveables only.

(2.) Funds specially destined to a particular purpose, including alimentary provisions, unless for alimentary debts, pensions, salaries of public officers, servants' wages, and wages of labourers, so far as necessary for subsistence. [By the Wages Arrestment Limitation Act, 1870, the wages of labourers, farm servants, artificers, &c., are (subject to certain exceptions) made not arrestable, except in so far as they exceed twenty shillings per week.]

- (3.) Bills in the hands of an indorsee; because they pass from hand to hand like like bags of money.

- (4.) Future debts; i.e., debts not due by the arrestee till after the execution of the arrestment.^{3(o)}

¹ Ersk. 2, 2, 9 and 10; Ersk. 3, 6, 9.

² Ersk. 3, 6, 6 *et seq.*; Bell's

³ Ersk. 3, 6, 9; Menzies Lect. Prin. 2276.

310 (320).

(o) This rule, as expressed, may seem not quite consistent with Ans. 457. It may be more correctly stated—"Debts, the obligation for which has not been incurred by the arrestee at the date of the execution of arrestment."

460. Within what time does an arrestment prescribe?

Arrestments prescribe in three years from their date, and when used upon a future or contingent debt they prescribe in three years from the time when the debt becomes due, or the contingency is purified.¹

461. When a creditor, intending to attach funds due to his debtor, is anticipated by arrestment at the instance of another creditor; What is the remedy competent to the former?

(1) To execute a poinding, if it can be carried through before decree of furthcoming at the instance of the arrester; (2) to render the principal debtor notour-bankrupt by personal diligence, which will cut down the arrestment, if within sixty days of the bankruptcy; (3) To take out a sequestration of the debtor's estates within sixty days of the arrestment, which will have the same effect.

462. What are the objects of an action of furthcoming?

(1.) To ascertain the amount of the debt due by the arrestee to the arrester's debtor; or, where goods have been arrested, to ascertain the precise extent of the subject. (*p*)

(2.) To have the arrestee decerned to pay the fund to the arrester, or so much of it as may pay his debt; or where the subject is corporeal, to authorise a sale and payment out of the proceeds.²

463. In a furthcoming, Is it necessary to call the common debtor? State the reason.

It is necessary to call the common debtor; because the creditor must establish his right to the fund by proving that he is the creditor of the common debtor who is entitled to resist the conclusions of the action upon grounds relating to the validity of the debt.³

464. What objections are competent to the common debtor, and the arrestee respectively, in an action of furthcoming?

(1.) To the common debtor, that he is not debtor to the arrester.

¹ 1 & 2 Vict. c. 114, § 22.

² Ersk. *ib.*

³ Ersk. 3, 6, 16.

(*p*) The pursuer must also establish the debt due to himself in order to prove the extent of his right to the subject arrested; Ersk. 3, 6, 16.

(2.) To the arrestee, that he is not debtor to the common debtor; or that he has a lien over the property; or that the arrestment is informal; or that he is under double distress.¹

IX. INDENTURE.

465. What is the effect of an indenture entered into by a minor without his father's consent?

It is null² [but see *contra* Stevenson, 10 M.P. 919]. In one case an indenture was sustained which had been entered into by a minor apprentice, with his father's knowledge and acquiescence, although the latter had not subscribed the deed as consenter.³(r)

466. May indentures be after-stamped?

(1.) All kinds of indentures may be after-stamped within three months, when executed within fifty miles from the limits of the weekly bills of mortality, and within six months when at a greater distance. [Indentures may now be after-stamped on the same conditions as other instruments under § 15 of the Stamp Act, 1870.]

(2.) Indentures of law apprentices may be stamped at any time on payment of a penalty. [This matter is now regulated by the Stamp Act, 1870, §§ 42 and 43.]

467. Where an apprentice-fee has been paid, may repetition of any part of it be demanded on the death of the apprentice or master?

(1.) On the apprentice's death, repetition cannot be demanded

¹ Bell's Com. ii. 63, 64.

³ Harvie, 7th March, 1829, 7 S.

² Low, 14th Nov. 1797; Hume 422. 561.

(r) In the case (Harvie) referred to, the circumstances were not exactly as here stated. The minor's father was dead; the indenture was entered into with consent of the minor's elder brother, who was held out as curator; and with the knowledge of his uncle, who was his curator-nominate, but did not interfere.

of any part of the fee ; because the contract, being necessarily personal, is dissolved by his death.¹

(2.) On the master's death, a proportion of the apprentice-fee is claimable for the period of the apprenticeship unexpired ; as the obligation on his part is not merely upon himself, but also upon his heirs, executors, and successors.² But no portion of the fee can be demanded if the master's representatives are ready to perform his part of the contract, by transferring the apprentice to another master properly qualified.³

468. Where the master, by the misconduct of the apprentice, has sustained loss and damage exceeding the penalty in the indenture ; May he recover the amount of his loss from the cautioner or the apprentice ?

Without a substantive obligation by the cautioner for general loss and damage, the master cannot demand from him more than the amount of the penalty ; but he may recover from the apprentice whatever loss he has sustained by breach of the indenture.⁴

469. What circumstances must concur to entitle a master to reclaim his apprentice after enlistment ?

(1.) The master must, within one month after the apprentice has left his service, emit the oath prescribed by the Mutiny Act before a justice of the peace.

(2.) The apprentice must be bound by a regular indenture for four years.

(3.) The indenture must be certified by a justice of the peace, within three months from the commencement of the apprenticeship, and before the enlistment.

(4.) The apprentice must be under twenty-one years of age.

(5.) If the apprentice has been previously bred to the sea, he cannot be reclaimed from the Navy.⁵

¹ Shephard, M. 589.

² Ogilvy, 2 Br. Sup. 34.

³ Cutler, M. 583.

⁴ Duff on Deeds, 294 ; Gunn, 21st July, 1835, F.C., 13 S. 1142.

⁵ 19 Vict. c. 10.(t)

(t) This is the Mutiny Act, which is passed every year, but is not printed *ad longum* in the statutes at large.

X. SUBMISSION.

470. What is the nature of a contract of submission?

It is a contract between two or more parties, whereby they agree to refer disputed rights or claims to the determination of one or more arbiters, as private judges, and bind themselves to abide by and implement the decision.¹

471. May a submission be verbal?

A verbal submission is ineffectual, except where the interest is of a very trifling amount. [See as to a verbal arbitration about marches, Otto, 9 M'P. 660.] The "Articles of Regulation concerning the Session" 1695, protecting decrees-arbitral against challenge, refer only to subscribed submissions.²

472. In entering into a submission with a minor or a company, what ought to be done to make the submission effectual?

(1.) In submissions with minors, the guardians must concur; and they should be taken bound personally to implement the decree-arbitral, as it is exposed to the risk of being set aside, as regards the minor, on his attaining majority, on the ground of minority and lesion.

(2.) A submission with a private company ought to be subscribed, not only by the company firm, but by the whole partners, as submission is not an ordinary act of administration.³

473. May a factor *loco tutoris*, or executors, or trustees, enter into a reference without special powers?

(1.) A factor *loco tutoris* appears to have power to enter into a reference regarding moveables, but not regarding heritage.⁴(u)

(2.) It is doubtful whether executors or voluntary trustees can

¹ Erak. 4, 3, 29.

³ Lumaden, M. 14567.

² Menzies Lect. 388 (395); Fraser, M. 8476; Ferrie, 5th June, 1824, 3 S. 118.

⁴ Falconer, 16380.

(u) It was observed, however, in Falconer's case that "the pupil might be restored *ex capite lesionis*."

refer, without special authority in the deed of their appointment, as they act for the sole purposes of collection and distribution.¹ [By the Trusts (Scotland) Act, 1867, gratuitous trustees are authorised (if not at variance with the terms or purposes of the trust) to submit and refer all claims connected with the trust-estate.]

(3.) A trustee for creditors, with the consent of the commissioners, has this power under the Bankrupt Act.²

474. May a married woman enter into a submission?

The general rule is, that a married woman cannot enter into a submission; because she is incapable of binding herself to implement the decree. But it is thought that a submission by a married woman would be sustained—(1) where she carries on a separate trade, and her husband is abroad, relative to the affairs of such trade; or (2) in a question with her husband as to the amount of a separate aliment; (x) or (3) in regard to her separate estate from which her husband's *jus mariti* and right of administration is excluded;³ [or (4) in regard to the earnings of a married woman, or investments representing them, in terms of The Married Women's Property Act, 1877.]

475. Where an agent enters into a submission, binding himself as taking burden for the principal to abide by, implement, and fulfil the decree-arbitral; Will the agent, on proving that he had been authorised by his principal, be personally bound? State the reason.

¹ Duff on Deeds, 304; Bell's Prin. 1998.

² 19 & 20 Vict. c. 79, § 176.

³ Duff on Deeds, 305; M'Gregor's Trustee, 22nd Jan. 1820, F.C.; (x) Ersk. 1, 6, 25.

(x) Such a submission is very different from ordinary contracts of that description, because the husband could at any time annul the award by putting an end to the separation, and it might not in all circumstances be binding on the wife; but the case of M'Gregor's Tr., cited, involved no question of this kind. There had been a contract of separation, in which the parties agreed to submit to arbitration the annuity to be paid to the wife. It was fixed at £80, restrictable to £50, if husband gave heritable or personal security; he gave security over a house, and afterwards failed. The trustee for his creditors challenged the security as a postnuptial provision; but it was sustained, as being effectual during the separation, the husband's right of putting an end to which could not be attached by his creditors, and no fraud being suspected.

The agent will be personally liable to implement the decree-arbitral; because the obligation is not merely an undertaking that the principal shall recognise and adopt the arbitration, but an engagement on the agent personally to fulfil whatever the arbiter shall award, whether his constituent shall acknowledge it or not.¹

476. Must the arbiter, in all cases, be *named* in the deed of submission?

In a submission of existing or anticipated disputes, it is essential that the arbiter be named, on the principle of *delectus personarum*, and that to sanction submissions which did not name the arbiters would be equivalent to creating a new court.² [The House of Lords, however, have sustained a reference of an existing dispute to a society consisting of a number of members whose names were not given in the agreement to refer, *Bremner*, 2 R. (H. of L.) 136.] But an exception to the rule is admitted (1) in arbitrations under the Friendly Societies Act;³ and (2) although a prospective engagement to refer future or anticipated disputes to arbiters not named, is not obligatory, yet the engagement is binding, although the arbiters be not named, where the reference forms an *essential part of another contract* [and is necessary for working out some stipulation thereof.](y) “The difference lies not in the reference being or not being contained in the body of a contract; but in its being a part of a contract in this sense, that the parties having agreed that a particular thing shall be ascertained or done, further agree that it shall be ascertained or done in a particular manner, namely, by arbitration.”⁵

¹ Woodside, 4th Feb. 1848, 10 D. 604.

² Buchanan, M. 14593.

³ Manson, 5th June, 1840, 2 D. 1015.

⁴ Menzies Lect. 388 (400); Smith, 28th Feb. 1843, 5 D. 749; Hendry's Trustees, 28th May, 1851, 13 D. 1001.

⁵ Orrell, 22nd Feb. 1859, 21 D. 554, p. Lord Deas.(z)

(y) Such a clause of reference in a mineral lease, “to persons of skill, to be chosen mutually by the parties,” means the nomination of one man of skill on each side, and does not imply the nomination of an umpire; *Cochrane*, 20th March, 1861, 23 D. 865; *Merry, &c.*, 21 D. 1337, 22 D. 1148; aff. 26th March, 1863, 1 M’P. 14.

(z) See also the cases of *Selkirk*, M. 627; *Pearson*, 4th Feb. 1859, 21 D. 419; *Birrell*, 9th March, 1859, 21 D. 640; and *M’Cord*, 20th Nov. 1861, 24 D. 75.

477. What is the effect of a submission to A and B, whom failing, to any person to be named by the sheriff?

The submission will be effectual during the life of A and B, but it will fall by their death.¹

478. Does interest or relationship in the arbiter disqualify him from acting?

(1) Interest (*a*) in the arbiter will not disqualify him if it be known to the parties at the date of the submission;² but it will be a disqualification if it subsequently emerge.³ (2) Relationship within the degrees disqualifying a judge is no objection, if known.⁴

479. Does a submission fall by the marriage of a female submitter?

It is thought that the submission will not fall if intimated to the husband; (*b*) on the principle, that as one of the parties who has assigned his claim to a stranger continues bound to implement the decree-arbitral to the other, so, on the other hand, the latter is excluded from the plea that by the assignation the submission has fallen.⁵

480. What is the effect on the submission of the bankruptcy of one of the parties?

A submission does not lapse by the bankruptcy of either

¹ Hendry's Trustees, 28th May, 1851, 13 D. 1001. S. 215; Tennant, 16th June, 1836, 14 S. 976.

² Johnston, 8th July, 1817, 5 Dow, App. 247. ⁴ Duff on Deeds, 810.

³ Mackenzie, 19th Dec. 1828, 7 Duff on Deeds, 824. ⁵ Henry, 29th Jan. 1835, F.C.;

(*a*) It is not a disqualification that the arbiter is the engineer for a railway company on the works to which the contract in which he is appointed relates; Trowsdale, 12th July, 1864, 2 M.P. 1334; 15th Dec. 1865, 4 M.P. 31; nor that an oversman appointed by the Lord Ordinary under the Lands Clauses Act had previously valued the subjects under a remit from the Sheriff; Mackenzie, 21st Dec. 1861, 24 D. 251. See as to construction of clauses of reference in contracts, Pearson, 4th Feb. 1859, 21 D. 419; M'Cord, 22nd Nov. 1861, 24 D. 75.

(*b*) Question whether a submission as to moveable claims by a married woman, to which her husband consents as her administrator and for his own interest, falls by his death; Robertson, 6th Feb. 1847, 9 D. 599.

party ; but it must be intimated to the trustee in the sequestration otherwise the decree-arbitral will not be binding on the creditors.¹

481. Within what time does a submission expire ?

(1.) The submission expires on the expiry of the period specified in the submission, where the deed contains such a specification.²

(2.) Where the endurance is left blank, whether with or without the words "next to come" after the blank, the submission expires on the lapse of a year and day after the last date of the submission.³

(3.) Where the submission contains no blank, nor a power to prorogate (which implies a limitation),⁴(c) but refers indefinitely to the decision of arbiters, questions, which evidently may not arise until years have elapsed, the submission will not expire by the lapse of a year.⁵

(4.) A submission also expires by the death of either party,(d) unless in the case of a judicial reference, or by the death of the arbiter.⁶

(5.) After the submission is expired the proceedings may be validated by homologation, as by appearing and pleading before the arbiter.⁷(e)

¹ Barbour, 21st Nov. 1811, F.C. ; Grant, 23rd June, 1820, F.C.

² Donaldson, 26th Jan. 1770, M., App. "Arbitration," No. 1.

³ Wallace, M. 639 ; Stark, 23rd Dec. 1820, F.C. App.

⁴ Menzies, 2 Br. Sup. 137.(c)

⁵ Ersk. 4, 3, 29 ; Halket, 16th Dec. 1826, 5 S. 154 ; Fleming, 7th July, 1827, 5 S. 906.

⁶ Macanqual, M. 636 ; Robertson, 6th Feb. 1847, 9 D. 599,

⁷ Fleming, 7th July, 1827, 5 S. 906.

(c) In the case of Menzies, here referred to, there was no time specified, and the submission was held to expire at the end of year and day.

(d) See *infra*, 482.

A submission falls by the death of one of the parties, though a third party who has the substantial interest in it, and is a consenter to it, may be willing to go on with it as if he were the principal ; Robertson, 6th Feb. 1847, 9 D. 599.

(e) There was a good deal of difference of opinion among the judges in the case of Fleming, and the judgment seems to have gone rather on the ground that the submission had not expired, though even on that point they were not unanimous. See also Orrell, 22nd Feb. 1859, 21 D. 554 ; Dundee & Aberdeen Railway Co. 31st Jan. 1851, 13 D. 552.

482. What classes of submissions do not fall by the death of either party, and how may the risk of expiration by death be obviated in ordinary cases?

(1.) A submission does not fall by death, where it forms part of another contract for the settlement of disputes which may arise out of it during its currency, but it endures as long as the contract to which it relates.¹

(2.) A judicial reference subsists until the termination of the process, and does not fall by the death of either party.²

(3.) Submissions under the Lands Clauses Consolidation Act.³(f) [See *Caledonian Ry.* 22 D. (H. of L.) 8, where it was held competent to renounce the benefit of the statutory provision that the award should be issued within three months, and yet so to import the statutory regulations as that the submission would not fall by the death of one of the parties.]

(4.) Where a reference had been made to a professional person, for the purpose of winding up the affairs of a company, and dividing the assets amongst the partners and their heirs, it has been held that the purpose of the reference and the qualifications of the referee showed that it was not an ordinary submission, but a contract to have the balance ascertained by a referee of skill, which did not fall by the death of one of the parties.⁴

(5.) A submission may be perpetuated by a special provision in the deed that it shall not fall by the death of either party.⁵ It is said that the submission will subsist where the parties bind themselves, *their heirs, executors, and successors*,^(g) to implement the decree-arbitral;⁶ but this is doubted by Professor Menzies.⁷

¹ *Montgomerie*, 23rd June, 1848, 10 D. 1887.

⁴ *Orrell*, 22nd Feb. 1859, 21 D. 554.

² *Watmore*, 17th May, 1839, 1 D. 743.

⁵ *Ewing & Co.* 19th Dec. 1820,

F.C.

³ 8 Vict. c. 19; *Cal. Rail. Co.* 12th Dec. 1849, 12 D. 338.

⁶ *Duff on Deeds*, 323; *Orrell*, 22nd Feb. 1859, 21 D. 554.

⁷ *Menzies Lect.* 392 (404).

(f) The provision referred to (§ 24) is quite express, but the parties in the case quoted, note 2, instead of following out the course prescribed by the statute (§ 35), where an award is not issued within a certain time, signed a minute prorogating the reference to the day of ; and it was contended, though not successfully, that this took it out of the statute, and converted it into a common law submission.

(g) The observation (*per Lord Deas*) in *Orrell's* case was—"Of the com-

483. May an arbiter or an oversman prorogate without authority in the submission?

An arbiter cannot prorogate without express authority;¹ but an oversman appears to have power to prorogate, although not expressly authorised by the submission, where it has been conferred on the arbiters themselves.²

484. Within what time may a submission be prorogated?

A submission may be prorogated by the parties themselves at pleasure.^(h) But prorogation by the arbiter must be within the term of endurance of the submission specified in the deed;³ or, if the endurance is blank, within a year and day of the last date of the submission.⁴

485. May a party to a submission, during its dependence, assign his claim under it, so as to substitute the assignee in his place?

Yes; but the cedent remains bound to implement the decree-arbitral to the other party, notwithstanding the assignation.⁵(i)

486. Is an arbiter bound to decide?

A sole arbiter after acceptance is bound to decide;⁶(k) but one of two arbiters can neither be compelled to pronounce an award nor choose an oversman; because it may be impossible for him to

¹ E. of Linlithgow, M. 636.

⁴ Wallace, M. 639.

² Glover, 11th Feb. 1805, H. of L., not reported; see Parker on Arbitration, 159.

⁵ Henry, 29th Jan. 1835, 13 S. 361.(i)

³ E. of Linlithgow, M. 636.

⁶ Marshall, 26th March, 1853, 15 D. 603.

petency of binding their heirs, even in an ordinary submission, there can be no doubt whatever;" but whether that quite comes up to the statement in the answer may perhaps be doubted. The usual style of a submission binds the heirs, &c., of the parties, and contains also the special provision here referred to.

(h) This is properly a renewal, rather than a prorogation.

(i) The only point decided or raised in Henry's case was the assignee's right to get decree in his own name; but Lord President Hope expressed the opinion here stated on the other point.

(k) This is the general rule, but "The arbiter may have good reasons for declining to proceed, such as ill-health, an intention of going abroad for a long time, or an emerging interest of his own;" per Lord President M'Neill in Marshall, cited.

agree with the other, either in the award to be pronounced, or in the selection of an umpire.¹

487. At what stage of the proceedings ought the nomination of an oversman by the arbiters to take place?

The arbiters ought to nominate an oversman before they proceed to consider the matters in dispute; "because they are more likely to agree upon a proper choice of one before they themselves begin to quarrel."² [In submissions under the Lands Clauses Act, the arbiters *must* nominate an oversman before proceeding with the reference.]

488. Where the arbiters cannot agree as to their award, may they be compelled to choose an oversman where they have power to do so?

No; because they may be equally unable to agree in the selection of an oversman as in the decision of the dispute.³

489. Where there are a plurality of arbiters, may a majority decide?

An award by a majority of the arbiters is not effectual, unless the deed confers power on the majority to decide.⁴(*m*) But where the submission contains such a power, a decree-arbitral signed by a majority is valid, although not subscribed by the dissentient minority.⁵

¹ White, M. 633.

³ White, M. 633.

² Per Lord Ellenborough; (*l*) Menzies Lect. 389 (402); Crawford, 4th Feb. 1858, 20 D. 488.

⁴ More, M. 14720.

⁵ Macallum, 3rd June, 1825, 4 S. 66, aff.(*n*)

(*l*) Jarman and Bythewood's Conveyancing, i. 665.

(*m*) From the report of More, cited, it seems doubtful whether it was a question about a submission. It bears, "The Lords found, since one of the four friends nominated to divide the 1500 merks among the children was dead, that the division made by the three surviving could not subsist, but that it ought to fall to them as it would by course of law and succession *ab intestato*." In Riddel, M. 14720, an opposite decision was given, a decree by two out of three arbiters being sustained, though the deed gave no power to a majority to decide. See also Watson, *ibid*.

(*n*) 23rd May, 1826, 2 W. & S. 344. See also Love, 1st June, 1825, 4 S. 53.

490. What is necessary to warrant the oversman to proceed with the reference?

- (1) Devolution on difference in opinion of the arbiters;¹ or
(2) the refusal of one of two arbiters to act.²(o)

491. Does prorogation by an oversman, to whom only some of the points in dispute have been devolved, keep the whole submission in force?

The effect of the prorogation is to continue the submission only in regard to the matters in dependence before the oversman, but not the whole matters in the submission.³(p)

492. How is the attendance of witnesses enforced; and may they be compelled to attend in a different county?

A compulsory order may be obtained from the Judge Ordinary or the Court of Session, upon an application, not in the Bill Chamber,(r) but by petition to the Court, authorised by the arbiter.⁴ A witness cannot be compelled to attend in a different

¹ Bryson, 10th June, 1823, 2 S. 382; Gordon, M. 655.

² Middleton, 9th June, 1721, Rob. App. 391.

³ Langs, 23rd Nov. 1852, 15 D. 38, rev. 8th May, 1855; 2 M'Queen, App. 93.

⁴ Ersk. 4, 3, 31; Harvey, 7th July, 1826, 4 S. 809.

(o) It seems doubtful whether the case of Middleton, here cited, is to be relied on as an authority for what is here stated. In that case the arbiters had appointed a day for pronouncing decree; they met, and one of them gave his opinion, the other declined to pronounce any decree, whereupon the appellant took a protest, and the oversman being present, appointed the next day, and then gave judgment. In a recent case, however (Frederick, 7th July, 1865, 3 M'P. 1069), an opposite view seems to have been taken. Here an award signed by one arbiter and an oversman, in whose favour there was no devolution, was held to be invalid; and it was observed *per* Lord Cowan, that "to give the oversman jurisdiction to act, even when regularly appointed, the arbiters must have differed in opinion." It was also held that under a formal submission the nomination of oversman must be made in writing.

(p) Devolution does not import prorogation; Thomson, 28th Jan. 1818, F.C.

(r) In vacation the application is made in the Bill Chamber; Caird, 1st June, 1865, 3 M'P. 851.

The Court interposed their authority to appointment of commissioner to take depositions of havers in England, and granted warrant for diligence to cite them; Blackies, 8th July, 1851, 13 D. 1307.

county,¹(s) unless it be absolutely necessary, as in a dispute about marches. [The Court will not grant warrant to cite a witness out of Scotland to appear before an arbiter in Scotland; Highland Railway, 6 M'P. 896. The proper course is to apply for a commission to take evidence under 6 & 7 Vict. c. 82.]

493. May *interim* decrees be pronounced without express authority in the submission; and is such a decree effectual if the submission has been allowed to expire without a final award?

Interim decrees, it is thought, may be pronounced without express authority; especially where the reference is articulate, consisting of detached heads, which may be taken up separately, and where no particular reason requires that they should all be kept up till every one of them is decided.²(t) It is said by Erskine, that if the arbiters "should presume to pronounce judgment upon all the articles claimed on the one side, and leave all those on the other undetermined, the decree is null."³ But where a valid *interim* decree has been pronounced, it is effectual, although the submission be allowed to expire before a final decree.⁴

494. May an arbiter claim remuneration or award expenses, where no provision is made in the submission for the arbiter's remuneration, or the expenses of the parties?

(1) The general rule is, that an arbiter is not entitled to

¹ Gordon, M. 634.

⁴ Taylor, 19th Jan. 1822, 1 S.

² Lyle, 2nd Dec. 1842, 5 D. 236; 253; M'Kessock, 14th Nov. 1822, 2 Lovat, M. 625.

S. 13.

³ Ersk. 4, 3, 33.

(s) The course in such a case is to take the evidence on commission; but in Caird, 1st June, 1865, 3 M'P. 851, an application for warrant to cite witnesses and havers resident in different counties to appear before the arbiter was granted.

(t) In Lyle, cited, note 1, there was a clause in the deed which was held to warrant interim decrees; but on the general question here stated the judges were not quite agreed; and in Frederick, *supra*, note (o) to Ans. 490, it was observed *per* Lord Cowan—"It is clear that when arbiters, having differed in opinion, are about to devolve a submission on an oversman, they must devolve on him the whole matter submitted, unless they have special power by the deed of submission to pronounce interim decree, and to devolve on him those particular points on which they differ."

remuneration, unless he stipulates for it before acceptance of the submission, the office being gratuitous.^{1(u)} (2) But it has been held, although with much difference of opinion, that an arbiter was entitled to a fee where the labour required of him in performing his duty was so peculiarly professional that he must have been selected from that circumstance alone; and where, from the arbiter's humble rank of life, it could not be presumed that he intended to give, or the submitters expected to obtain, his services gratuitously.^{2(x)} [It has also been held, although with hesitation by some of the judges, that in special circumstances the parties understood that a professional accountant, to whom an action of count and reckoning had been submitted, was to be remunerated; Henderson, 5 M.P. 628.] (3) Where the arbiters are the ordinary law agents of the parties, they are entitled to charge for their trouble in the submission.^{3(y)} (4) A judicial referee is entitled to a fee.⁴ (5) An arbiter may award expenses to either party, although the submission contains no authority to that effect.⁵

495. What is peculiar in the clause of registration of the submission?

¹ Kennedy, 20th Jan. 1819, F.C.

⁵ Ferrier, 28th Jan. 1843, 5 D.

² Macallum, 26th June, 1810, F.C.

456, aff. 18th April, 1845; 4 Bell's

³ Lyle, 2nd Dec. 1842, 5 D. 236.

App. 161.(z)

⁴ Baxter, 1st June, 1838, 16 S.

1085; Yates, 7th June, 1848, 10 D.
1233.

(u) Since the judgment in Kennedy, cited, the question has been repeatedly raised whether an arbiter is entitled to stipulate for remuneration. See Baillie, 19th May, 1829, 7 S. 619; Fraser, 5th July, 1834, 12 S. 887; Fraser, 26th May, 1838, 16 S. 1049. In the last case the stipulation was made after the acceptance, but at an early stage of the proceedings, and was sustained on the verdict of a jury finding that it did not imply corruption.

(x) Professor More (Notes on Stair, p. 55), says Macallum, cited, "can scarcely be relied on as authority," and that "after having been carried by appeal to the House of Lords, it was compromised before the hearing."

(y) Lyle, cited, was a special case, and can hardly be held as warranting this rule. In that case the objector's own agent and arbiter had made professional charges, but it did not appear that the other had done so; and Lord Jeffrey remarked—"One would not be inclined to sanction a mixture of the character of arbiter and agent."

(z) The same judgment had been given, Robertson, 16th Dec. 1836, 15 S. 199.

By this clause the parties consent not only to registration of the submission, but also of the prorogations and *interim* or final decrees to follow upon it for the purpose of summary execution, which cannot proceed on the decree-arbitral, unless the submission contain a consent that both be registered for that purpose.¹

496. Does an award, in all cases, require to be holograph or tested?

(1.) A decree-arbitral must be a formal attested deed.²

(2.) The judgment of a judicial referee requires neither to be holograph nor tested; because it is an act to which the parties are held to have consented that the authority of the judge should be interponed.³

(3.) The opinion of counsel upon a mutual memorial is binding as a decree-arbitral, although authenticated merely by the counsel's signature; because the parties are held to have in view the invariable form in which such opinions are embodied.⁴

(4.) A decree-arbitral pronounced on a Scotch submission to an arbiter in England, and authentic by the law of that country, does not require to be probative by the law of Scotland.⁵

497. May the construction of a decree-arbitral be aided by extraneous evidence?

The construction of the decree-arbitral cannot be aided by extraneous evidence; (a) the decree-arbitral being the only legal evidence of the meaning of the arbiters; nor is it competent to prove by parole the grounds on which the award proceeded, or that there was any agreement between the parties apart from the award.⁶ But if a judicial award contains a reference to the arbi-

¹ Wood, M. 624; Knox, M. 625.

⁵ E. of Hopetoun, 6th March, 1856.

² Robertson, M. 653.

18 D. 739.

³ Menzies Lect. 404 (417), note.

⁶ Guthrie, 18th March, 1858, 20 D.

⁴ Fraser, 29th July, 1850, 7 Bell's

825.

App. 171.

(a) In King, 20th May, 1828, 6 S. 1006, an opinion was expressed (*per* Lord Justice-Clerk Boyle) that "where on the face of the deed itself there appears an excess of power, reference may perhaps competently be made to notes to remove all doubts;" and in the case of Guthrie, cited, *infra*, note 6, the arbiter's notes were looked at with the view of ascertaining whether, in calculating the sum allowed as the value of ground taken for a railway, he had proceeded on the basis of an alleged agreement by the company.

ter's notes, these may be read as part of the award;¹ and, even without such a reference, it is said that where the award is ambiguous, the Court would call upon the referee to explain or rectify it; because until the judgment of the referee be confirmed by the Court, the proceedings are still open, and a judge is entitled to withhold his sanction from an ambiguous award.²

498. An arbiter executed and posted for the parties, a decree-arbitral on the last day of the subsistence of the submission, but it was not delivered to the parties until the submission had expired; Was it effectual?

Yes; a decree-arbitral being effectual if signed and, within the period prescribed by the submission for issuing it, put by the arbiter in the course of transmission, for the purpose of being delivered.³

499. On what grounds are decrees-arbitral reducible under the "Articles of Regulations concerning the Session," dated 29th April, 1695?

By the "Articles of Regulations" it is declared that decrees arbitral shall not be reducible, "at the instance of either of the parties' submitters, upon any cause or reason whatsoever, unless that of corruption, bribery, or falsehood to be alleged against the judges-arbitrators who pronounced the same."

500. Is refusal to receive evidence, or to hear the parties, on the part of the arbiter a relevant ground of reduction of the decree?

The refusal to receive evidence(b) or to hear the parties is, in

¹ Mackenzie, 9th March, 1843, H. of L., 2 Bell's App. 43.

² M'Quaker, 19th March, 1859, 21 D. 794.

³ Duff on Deeds, 348. See Anderson, 22nd June, 1833, 11 S. 778.

(b) The rule in regard to receiving evidence should rather be stated in the opposite way; a refusal to receive it is in general not a valid ground of reduction. A submission having been devolved on an oversman, one of the parties craved a proof; which was refused. In a reduction of the award, it was held "that the arbiter was sole judge of the propriety of allowing a proof;" and observed, *per* Lord Justice-Clerk Inglis, that "a refusal of proof not only

the general case, a competent ground of reduction ; and it may be laid down as an absolute rule, that no decree-arbitral can stand where the arbiter has received the evidence of one of the parties, and has refused to hear the other.¹ But the parties to a submission are not entitled to be re-heard, and it does not vitiate the arbitration that the oversman had taken part in the proceedings throughout, and had at length pronounced decret-arbitral on information obtained by him as oversman elect ;² and where the arbiter is selected as a person of skill, and the reference relates to matters of opinion, he is entitled to exercise his own judgment, and is not obliged to listen to the opinions of other skilled persons.³

501. What is the effect of an award *ultra vires compromissi* ?

Such an award generally is sustained only in so far as it is within the submission, and reduced *quoad excessum*.⁴ But where the decision of one point, which is *ultra vires*, cannot be set aside without affecting another which is within the submission, the award will be wholly reduced.⁵

502. What is the effect of a submission with regard to prescription ?

A special submission interrupts prescription ; because it is equivalent to a demand by the creditor of his claim, and to joining issue with the debtor in an action at law. But a general submis-

¹ Sharpe, 24th Feb. 1815, H. of L., 3 Dow's App. 102 ; E. of Dunmore, 28th Jan. 1835, 13 S. 356.

² Crawford, 4th Feb. 1828, 20 D. 488.

³ Johnston, 8th July, 1817, 5 Dow's App. 247 ; Macdonald, 8th Dec. 1843,

6 D. 186 ; Mitchell, 17th June, 1848, 10 D. 1297 ; M'Nair's Trustees, 16th Feb. 1855, 17 D. 445.

⁴ Crawford, M. 6835 ; Kidd, 19th June, 1810, F.C.

⁵ Reid, 15th Dec. 1826, 5 S. 140.

affords no presumption of any evil intention on the part of the arbiter, but is in many cases a perfectly correct course, and it may be imperatively forced on the arbiter by the highest considerations of justice ;" Ledingham, 16th Dec. 1859, 22 D. 245. The same principle had been recognised (*per* Lord Fullerton) in Mitchell, 17th June, 1848, 10 D. 1297, though there the award was set aside on the ground that the arbiter had received evidence on the one side, and refused to do so on the other. See also Miller, 10th March, 1855, 17 D. 689.

sion does not interrupt, unless followed by proceedings pointing out the particular claims.¹(c)

XI. CONTRACT OF COPARTNERY.

503. Define partnership.

Partnership may be defined as "a mutual contract and voluntary association of two or more persons for the acquisition of gain or profit, with a contribution, for that end, of stipulated shares of goods, money, skill, and industry."²

504. Can any one of several partners bind the company by signing the firm to a bill, if the contract prohibits his doing so? State the reasons.

(1.) If the bill is granted in relation to a matter which might reasonably be supposed to fall within the line of the company's business, the company will be bound by it, if the receiver was ignorant of the prohibition; because the public have no notice of the provisions of the contract, being a private deed, and are entitled to rely on the law of partnership, which establishes a general institorial power in each partner to bind the company.

(2.) If the party receiving the bill was aware of the limitation, he cannot claim upon it against the company, although granted in relation to the company's business; as he is barred by personal exception from pleading the general law of partnership.(d)

(3.) If the bill is not in the line of the company's business, the firm will not be bound to the original receiver of the bill; because the institorial power of binding the company at common law applies only to matters connected with the business.

(4.) If the company have recognised or adopted the bill by the

¹ Duff on Deeds, 307.

² Bell's Prin. 351.

(c) Several of the matters referred to in this title should be, and generally are, provided for in the deed of submission; such as those in Ana. 480, 481 (4) (including agreement that in the event of the arbiter's death any evidence, &c., previously taken shall be available in any after proceedings between the parties), 483, 487, and 493.

(d) It is not clear, however, that the company, though not liable on the bill, might not be so on other grounds for the debt, if the partner was entitled to make transactions, though not to sign bills in relation to them.

prohibited partner, it will be binding on them, whether in the line of the business or not, the objections otherwise competent to them being excluded *personali exceptione*.

(5.) If the bill, during its currency, has found its way into the hands of a *bona fide* onerous indorsee, it will, in all circumstances, be binding on the company; because onerous indorsees, without notice, and acquiring the right before the term of payment, are not liable to latent objections pleadable against the drawer and indorser. But if the bill has been acquired by the indorsee after it is due, he is liable to all such objections.¹

505. Does a partner, who fraudulently uses the company firm, bind the other partners?

(1) The whole partners will be bound if the obligation is in the line of the partnership.² (2) But if the fraudulent transaction is manifestly different from the company's trade,^(e) the company's signature gives no recourse against partners ignorant of the fraud.³

506. Can a partner assign his interest in the company?

Unless authorised by the contract, or with consent of the others, a partner cannot assign his interest in the company, to the effect of substituting the assignee as a partner, on account of the *delectus personæ* implied in partnership; but he may assign his interest in the stock and profits due to him at the dissolution of the company.^{4(f)} [See Cassels, 6 R. 955 in confirmation of the last sentence in the note.]

¹ Bell's Com. ii. 503; Dewar, M. 14569; Clark, 30th Nov. 1821, 1 S. 179; Propa. of Bo'ness Canal, 23rd June, 1791; Hume, 751; 19 & 20 Vict. c. 60, § 16.

² Bell's Prin. 354.

³ M'Nair, 19th Jan. 1803; Hume, 753.

⁴ Neilson, M. 14564.

(e) This expression is perhaps not the best for conveying the meaning. Professor Bell's (Com. ii. 506) expression is "the usual course of trade," which probably implies something more than a deviation from the *kind* of trade, though in some cases this might be sufficient. The view now suggested seems to derive support from Professor Bell's illustration, which is—"Thus a reference to arbitration will not bind the company if signed or agreed to by one of the partners," &c.

(f) The question in Neilson's case (cited) was not as to an assignation, but as to the competency of attaching a partner's share by arrestment or confirmation as executor-creditor. See as to the point in this answer, note (r), to Ans. 302. The assignation to the profits may take effect before the dissolution.

507. Where a single individual trades under a company firm, Have the creditors dealing with that firm a preference over the stock? State the reason.

No; because one person cannot make a partnership; for the reason, that an individual, by a fictitious partnership, might have a dangerous power of acting unfairly towards his creditors.¹(g)

508. Is a company liable for obligations granted by a partner in his own name in the line of the company's business, and *in rem versum* of the company? State the reason.

The company is not liable if the partner is the proper debtor in the obligation, and it is undertaken in his own name; because the creditor had no grounds for relying on the credit of the company.²(h)

¹ Nairn, 5th Feb. 1798; 1 Bell's Illus. 252.

² Menzies Lect. 412 (424); White, 12th Jan. 1841, 3 D. 334; Crum, 5th March, 1858, 20 D. 751.

(g) But a company may be constituted in name of an individual, and summary diligence may proceed against any partner on a decree against the company under that name; Drew, 14th Jan. 1865, 3 M'P. 384.

(h) As a general rule, the statement in this answer is correct; but it is not easy to conceive a case purely and precisely meeting the conditions of the question, and the cases cited do not so meet them. In one sense an obligation may be said to be *in rem versum* of any and every one who, however indirectly or remotely, derives benefit from it. Of this, White (cited) is an illustration. He had entered into a joint adventure with Reid, a builder, for the erection and letting of houses. Reid was to erect and finish them, and White was to pay him a certain sum by instalments "as the stipulated price of erecting and finishing the said buildings." Reid employed M'Intyre to execute the brickwork, and before completion of the buildings, failed, having, however, received more from White than was due; and M'Intyre sued White for payment of his account, who pleaded, successfully, that the contract was not, as alleged, with or for the benefit of the joint adventure, but with Reid alone. Here, if White was benefited, it was only through Reid being thereby enabled to make his stipulated contribution to the joint adventure. The contract was entered into by Reid on his own account, and, in the words of Professor Bell (Com. ii. 542), "the transfer to the concern is by the commutative operation of partnership, not by sale and mandate." If, however, a company were to be put in possession, and to accept of goods which they knew had been bought by a partner to whom they had given no consideration for them, which would be a direct case of *in rem versum*, it seems not quite certain that they would not be liable to the seller.

509. Where the contract contains a reserved power to a majority of the partners to alter the contract; Does that give the majority a power to increase the capital? State the reason.

No; because the amount of capital, when fixed by the contract, is a fundamental article of the partnership, and cannot be increased without the consent of all the partners.¹(i)

510. When the contract contains no provision relative to the partners' shares of the profits; How will these be fixed?

(1.) Where the shares of the profits are not expressed, they are presumed to be proportionate to the amount of capital contributed by each partner.

(2.) Where neither stock nor profits are specified, the presumption(k) is for equality, in the absence of proof to the contrary.²

511. Where a company holds heritable property, Does a partner's share of it, on his death, fall to his heir or his executor?

¹ *Monro*, 5th Feb. 1851, 13 D. 595.

² *Ersk.* 3, 3, 19; *Menzies Lect.* 415 (427).

(i) In this answer there is introduced a condition which is not in the question,—viz., "the amount of capital, when fixed by the contract," and the rule is laid down too broadly. The judgment in *Monro* proceeded on the opinions of a majority of the judges, that one of the articles of the contract (which was of a joint-stock company) fixed a limit to the capital in terms which over-rode and controlled the article containing the general power to alter, and excluded its operation in that respect. The case was decided on a construction of the contract, and not on the general principle assumed in the question. Had the contract not contained that special clause, the general power to alter would probably have been held to extend to and include an increase of capital; and at all events there is nothing to prevent such a power being given in the contract, the judgment in *Monro* going only this length, that where the capital is limited, it cannot be increased "without the consent of all the partners, *unless the contract contained a clause conferring that power on a majority.*"

(k) It is a presumption of fact, not of law; *Campbell's Trs.*, H. of L. 5 W. & S. 16; *Aberdeen Town and County Bank*, 20th Nov. 1859, 22 D. 44. There was no contract, but the principle is the same.

It falls to his executor; because the whole property being divisible among the partners at the dissolution of the company, the whole, whether heritable or moveable, is personal as to succession.¹(l)

512. May money owing to a company by one of the partners, be arrested in the hands of a creditor of the company? State the reason.

Yes; because a company has a separate *persona*, and is capable of maintaining independently the relations of debtor and creditor.²

513. What is the effect of a partner stipulating to be free from losses, in a question with his partners and with the public?

(1) Such a stipulation is effectual among the partners, as they can regulate their individual interests and liabilities *inter se*, as they please; but (2) as regards the public it has no effect, as all the partners of a company are held universally responsible for company debts, to "their last acre and their last shilling."

514. How may a person incur responsibility to third parties as a partner of a company, although there is no proper constitution of partnership as between the partners themselves?

(1.) By receiving as a partner(n) a share of the profits, or by entering into an agreement under which he is entitled to a share.(o)

¹ Minto, 23rd May, 1833, 11 S. 632; Irvine, 15th July, 1851, 13 D. 1867.

² Hill, 13th Nov. 1849, 12 D. 46.

(l) The reason is rather because the whole property must be converted into money; Bell's Com. ii. 535. In Irvine, cited, there does not seem to have been any heritable property belonging to the company. The question was as to the effect of a clause in the contract which declared that a partner's share should belong to his heir in rendering that share heritable as to succession. In Minto, the question was whether certain heritable property belonged to the company or to one of the partners individually.

(n) The words "as a partner" should be delete.

(o) This rule is now altered. By the 28 & 29 Vict. c. 86, it is enacted (1) that (§ 1) "The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking, upon a contract in writing with

(2.) By permitting his name to be used, or his credit relied on as a partner, whether he participates in the profits or not.¹

515. What circumstances, *eis ipsis*, operate as a dissolution of a company, and what form only a ground for dissolution?

(1.) The death of one of the partners operates as a dissolution; because from the *delectus personæ* implied in partnership, heirs are excluded. But it will subsist after the death of a partner where a provision to that effect is contained in the contract; (*p*) or, if it be necessarily implied that heirs are to be admitted, as in a contract exceeding the term of human life. (*r*)

(2.) It is held in England that the marriage of a female partner operates as a dissolution; (*s*) as otherwise her husband would be introduced into the partnership without the consent of the other partners.

(3.) The insanity (*t*) of a partner is a ground of dissolution, but it does not *eo ipso* dissolve the partnership.

¹ Bell's Prin. 363; Geddes, 24th July, 1820; 2 Bligh's App. 270.

such person, that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profit arising from carrying on such trade or undertaking, shall not of itself constitute the lender a partner," "or render him responsible as such;" but (§ 5) in case of the bankruptcy or insolvency of such trader, "the lender of any such loan as aforesaid shall not be entitled to receive any portion of his principal, or of the profits or interest payable in respect of such loan," "until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied."

And (2) that (§ 2) "No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking, by a share of the profits of such trade or undertaking, shall of itself render such servant or agent responsible as a partner therein, nor give him the rights of a partner."

(*p*) A contract provided that "in the event of the death of either of the partners during the currency of this contract," "the surviving partner shall continue to carry on the business along with the representatives of the deceased partner." Held that the partnership was not dissolved by the death of one of the partners, and observed that the representatives of the deceased partner were neither bound nor entitled to make any election; Hill, 22nd Feb. 1865, 3 M.P. 541.

(*r*) So held, Warner, M. 14603, where the contract was for 124 years.

(*s*) Professor Bell expresses an opinion to the same effect; Com. ii. 524.

(*t*) Or other disease producing incapacity; Bell's Com. ii. 525.

(4.) Insolvency or bankruptcy under the Act 1696, c. 5, is a ground of dissolution, but it does not alone dissolve a partnership; because it does not operate as a transfer, nor impose any disability on the partner. [If, however, it is an express condition of the contract of copartnery that in the event of the declared insolvency of any of the partners, he should thenceforth cease to be a partner, the partnership will be held to be dissolved when one of the partners has been openly declared insolvent. Hannan, 7 R. 380.]

(5.) Sequestration, or a trust-conveyance to creditors,^(u) operates as a dissolution; because by these means the bankrupt partner is divested of his property.

(6.) Partnership may be dissolved by mutual consent before the expiration of the term fixed by the contract; or by a majority of the partners, provided the dissolution be made on justifiable grounds.

(7.) It may be dissolved by renunciation, where no term is fixed; but the renunciation must not be fraudulent, nor at such a time as would occasion injury to the other partners; or where a term has been fixed for the endurance of the partnership, it may be dissolved by renunciation, on just cause shown, as impossibility of the accomplishment of the objects of the company.

(8.) The expiration of the term does not *ipso facto* dissolve the company, and it may be continued by tacit consent; but on 'expiration of the term the partners are entitled to separate.'¹

516. What is necessary to relieve a retiring partner from the future liabilities of the company?

Due notice of his retirement;^(x) because after a credit has

¹ Ersk. 3, 8, 25; Bell's Com. ii. 521 *et seq.*; Bell's Prin. 373-378.

^(u) See Bell's Com. ii. 634.

^(x) Professor Bell says (Com. ii. 533) that "in anonymous partnership, if known to any one person, publication" of retirement "is necessary," and refers to *Kay v. Pollock* (reported in F.C. as *Hay v. Mair*), 27th Jan. 1809, where it was so held. The rule in England is understood to be different, and the question may perhaps deserve reconsideration. The rule that a latent partner shall be liable for all obligations of the company incurred while he is a partner, and that even after retiring he shall, until notice, remain liable for obligations incurred to parties who had been aware that he was a partner, rests on obvious principle; but it is not so clear that, after retiring, he should be liable to parties who, never having known that he had

been raised on the faith of the partnership, the public is entitled to rely on the liability of all the partners until the separation of any one is notified, or the identity of the firm destroyed. And (1) for the purpose of preventing *subsisting* credit, (y) notice must be given to those who have dealt with the company, by letter ; or by personal communication ; or by a change of the firm ; or by a change on the cheques or invoices ; or by newspaper advertisement, with proof of its having been actually read.¹ (2) For the purpose of preventing *possible* (z) credit, notice must be given to the public at large, by gazette and newspaper advertisements, accompanied with all reasonable means to publish the dissolution.² Private knowledge is equivalent to intimation ; as that is not a matter of solemnity, but for information only.³

517. On what principle rests the preference of a company creditor over a creditor of a partner on the stock of the company ?

The preference of the creditors of the company on the stock is founded on the principle that the partners hold the stock as trustees for payment, in the first place, of the company's debts ; and none of the partners, nor any one in their right as individual creditors, are entitled to more than the reversion after the purposes of the trust are fulfilled.⁴

518. Can an action be maintained, in the first instance, against a partner for a debt of the company ? State the reason.

¹ Bell's Prin. 384 ; Bell's Com. ii. 530 *et seq.*

² Aytoun, 19th July, 1844, 6 D. 1409.

³ Bell's Prin. 385 ; Bell's Com. ii. 532.

⁴ Bell's Com. ii. 501 and 549 ; Corrie, 24th Jan. 1761, F.C.

been a partner, cannot allege that they relied on his security. In Aitken, 4th Feb. 1830, 8 S. 446, it was observed *per* Lord Justice-Clerk Boyle,—“ I apprehend that in the case of the discovery of a latent partner the *onus* lies on the party attempting to establish the responsibility to show that he really was a partner at the time of the transaction.”

(y) That is to say, to prevent incurring liability for future obligations to former customers ; no notice will relieve a retiring partner of liabilities already contracted.

(z) That is to say, future obligations to strangers or parties who have not previously traded with the company.

The debt must first be constituted against the company ; because the partnership is held, as in law, a separate person, capable independently of maintaining the relations of debtor and creditor. When the debt has been constituted against the company, the creditor may proceed against the partners without discussing or calling the company ; because each partner is liable *in solidum* for the company's debts.¹

519. May a creditor of a firm proceed against another and different firm, composed of the same partners as the firm which are his debtors ?

(1.) He may, where, although the firms are different, the trade is the same, and they are the same in object and in interest.²

(2.) He may not, where the companies differ in name, in trade, and in capital.^{3(b)}

520. To what effect does a partnership subsist after its dissolution ?

The partnership is dissolved in so far as the power of contracting new debts is concerned ; but it subsists for the winding up of the concern,(c) and terminating all the engagements and responsibilities of the company ;⁴ and action for realising the company's claims may competently be sued at the instance of the firm.⁵

¹ Bell's Com. ii. 507 ; Geddes, 2nd June, 1827, 5 S. 747 ; M'Tavish, 3rd Feb. 1821, F.C.

² Bertram, Gardner, & Co., 25th Feb. 1795,(a) F.C. ; Royal Bank, 20th Jan. 1813, F.C.

³ Forrester's Cra., 5th Feb. 1798,(a) F.C.

⁴ Bell's Prin. 387 ; and cases cited ; Bell's Com. ii. 527 and 533.

⁵ Malleable Iron Co., 21st Feb. 1855, 17 D. 461.

(a) These cases are not reported in F.C. of the dates given, but they are referred to, Bell's Com. ii. 515, notes 1 and 2.

(b) See as to the distinction here stated, Bell's Com. ii. 515 *et seq.* In all the three cases there quoted the companies as to which the question arose were held to be the same, and the funds and debts were massed together ; but it is to be kept in view that the cases occurred in bankruptcy, and the point to be adjusted was the ranking of the different sets of creditors, and so far as that goes the rule is as stated ; but whether in ordinary circumstances a creditor could, at least in the first instance, proceed in the way supposed, *Ans.* (1), is very doubtful.

(c) The Court will, if necessary, appoint a neutral person to wind up ; Bell's Com. ii. 524, 528, and 535.

521. Are the representatives of a deceased partner liable for debts contracted by the company before or after his death, where they have paid to the company the deceased partner's share of the existing liabilities, and received a full discharge from them?

(1.) The representatives continue liable for the company's debts contracted *before the death of the partner*; as no release by a company to any one of their number, or to his representatives, can discharge the responsibility to third parties for debts already incurred; although the representatives may be entitled to relief against the co-partners.¹

(2.) The representatives are not liable for future debts; as the death of a partner operates as a dissolution of the company,^(d) and requires no notice.²

522. Are the representatives of a deceased partner liable for a debt constituted by bill, and contracted by the company before his death, if the creditor has cancelled and delivered up the bill, and accepted the company's renewal, the creditor being ignorant of the death of the partner?

It is thought that the representatives of the deceased partner will not be liable; because—(1) the death of a partner operates as a dissolution of the company; and, being a public fact, requires no notice;³ and (2) the old bill having been cancelled and delivered up, and the renewal being a bill of the new company, the original obligation is discharged by novation or delegation.^{4(e)}

¹ Bell's Com. ii. 529; Ramsay's 17th May, 1839, 1 D. 745; Aytoun, Exrs., 18th Jan. 1814, F.C. 19th July, 1844, 6 D. 1409.

² Authorities in following Ans.

⁴ Kerr, 22nd Feb. 1845, 7 D. 494.

³ Ersk. 3, 6, 26, note 128; Christie, See Balfour, 5th March, 1831, 9 S. 558.

(d) Subject to the exception stated in Ans. on page 236.

It is provided by 28 & 29 Vict. c. 86, § 3, that "No person, being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall by reason only of such receipt be deemed to be a partner of, or to be subject to, any liabilities incurred by such trader."

(e) In reference to this question the case of Pollock, 8th Nov. 1863, 2 M'P. 14, may be mentioned, where an opposite judgment was given. There a

523. Where a partner retires with a share of the profits or an annuity, Will he be liable for the future debts of the company?

(1.) A retiring partner will be liable for future debts if he continue to draw a share of the profits.

(2.) Where he sells his interest in the partnership for an annuity, he will not be liable for future debts; because this is merely a purchase by the company of his share of the stock.

(3.) If, in addition to the price of his interest in the company, he receive an annuity *in lieu of profits* for a certain time, he will continue liable for future debts.

(4.) If he receive an annuity corresponding to the profits, that is equivalent to profits, and his responsibility for the obligations of the company remains undischarged.¹(f)

524. When a partnership is dissolved by death, What are the general rules for fixing the time at which the profits shall be held divisible, in the absence of stipulation?

The rules are—(1) in general the date of dissolution of the partnership is the date of the division of the profits, where that is practicable; and (2) the representatives of a deceased partner are entitled to participate in the subsequent profits only where such profits are the necessary result of transactions undertaken or commenced before the dissolution.²

¹ Bell's Com. ii. 534.

² Bell's Com. ii. 537.

firm bought goods, and, before payment, advertised that they had transferred the business to A, who would receive payment of all debts due to, and discharge all obligations of, the firm. The sellers received from A a partial payment, and took his bill for the balance of an account, consisting of those goods and others sold to himself. A having failed, the sellers sued the original purchasers for the price. Held that delegation had not taken place, and that they were still liable. The case, however, was very special.

(f) A change has been introduced on the points referred to in this answer by the 28 & 29 Vict. c. 86, which provides (§ 4) that "No person receiving, by way of annuity or otherwise, a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall by reason only of such receipt be deemed to be a partner of or be subject to the liabilities of the person carrying on such business;" but (§ 5) in the event of bankruptcy or insolvency, "such vendor of a goodwill as aforesaid" shall not "be entitled to receive any such profits as aforesaid until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied."

525. What are the rules as to a company creditor voting and ranking on the sequestrated estate of a company and the partners?

(1.) A creditor on the estate of a company is not bound, for the purpose of voting on the company's estate, to deduct from his claim the value which he may be entitled to draw from the estates of the partners; but if he claim on the estate of a partner, he must, before voting, put a value on his claim against the estate of the company, and also against the other partners, and deduct such value from his debt.¹

(2.) When a creditor claims on the estate of a partner in respect of a debt due by the company, the trustee on the estate of the partner must, before ranking the creditor, put a valuation on the estate of the company, and deduct from the creditor's claim such estimated value, and rank and pay to him a dividend only on the balance.²

[The following questions, under the Companies Acts, have been varied from those appearing in the last edition.]

[526. What particulars are specified in the memorandum of association of a limited liability company under Companies Acts, 1862 to 1880?

I. COMPANY LIMITED BY SHARES.

(1.) The name of the proposed company, with the addition of the word "limited" as the last word in such name.

(2.) The part of the United Kingdom, whether *England*, *Scotland*, or *Ireland*, in which the registered office of the company is proposed to be situate.

(3.) The objects for which the proposed company is to be established.

(4.) A declaration that the liability of the members is limited.

(5.) The amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount; 25 & 26 Vict. c. 89, § 8.

II. COMPANY LIMITED BY GUARANTEE.

(1, 2, and 3 the same as in No. I.)

¹ 19 & 20 Vict. c. 79, § 61.

² *Ib.* § 66.

(4.) A declaration that each member undertakes to contribute to the assets of the company in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceased to be a member, and of the costs, charges, and expenses of winding up the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required not exceeding a specified amount; 25 & 26 Vict. c. 89, § 9.]

[527. State the nature and object of the articles of association of such a company.

The articles of association which, in the case of a company limited by shares, *may* be registered along with the memorandum, and in the case of a company limited by guarantee, *must* be so recorded, contain the regulations or byelaws of the company. The specimen appended as Table A to the 1862 Act, may be adopted in whole or in part as the articles of the company. The articles are to bear the same stamp as if they were contained in a deed, are to have one witness to each signature, and are to form the contract between the members of the company; 1862 Act, §§ 14 to 16.]

[528. What is the effect of the registration of a company under the Companies Acts?

The company becomes a body corporate by the name prescribed in the memorandum, having perpetual succession, and a common seal, with power to hold lands; Act of 1862, § 18.]

[529. May such a company hold land to an unlimited extent?

Yes; but no registered company, for promoting art, science, religion, or charity, or the like, can hold more than two acres of land. The Board of Trade, however, may empower a company, for the purposes mentioned, to hold lands in such quantity and subject to such conditions as they think fit; Act of 1862, § 21.]

530. By whom may deeds by a registered joint-stock company be granted ?(s)

(s) There is no express provision in this respect in the Act of 1862, but it is believed that deeds may be executed in the name of the company, as such,

Deeds may be granted in name of the company by any person acting under the express or implied authority of the company. [Section 56 of the Conveyancing Act, 1874, is in the following terms:—"Any deed executed after the commencement of this Act, to which any company registered under 'The Companies Acts, 1862 and 1867,' is a party, shall be held to be validly executed in Scotland on behalf of such company if the same is either executed in terms of the provisions of these Acts, or is sealed with the common seal of the company, and subscribed on behalf of the company by two of the ordinary directors and the secretary of the company; and such subscription on behalf of the company shall be equally binding and effectual whether attested by witnesses or not."]

531. In whose name do judicial proceedings at the instance of a company proceed?

(1.) Incorporations sue in the manner pointed out in the Royal Charter, or Act of Parliament, or Letters Patent, incorporating the body; and where this is omitted, the proper method is to use the corporate name.¹ Joint-stock companies, duly registered, are bodies corporate, and accordingly may sue by the name prescribed by the memorandum of association.^(t)

(2.) Unincorporated joint-stock companies may sue in name of their cashier, or other principal officer authorised by the contract of copartnery.²

(3.) Mercantile companies, carrying on business under a proper

¹ Ersk. 1, 7, 64; Fisher, 7th Dec. 1827, 6 S. 216; Whitehaven Railway Co., 2nd June, 1848, 10 D. 1127.

² Bell's Com. ii. 519.

simply under its common seal, the affixing thereof being attested on the deed by two officials (such as chairman and secretary, or directors) of the company; see §§ 55 and 72 of Act.

Promissory-notes or bills of exchange are "deemed to have been made, accepted, or indorsed on behalf of" the company if made, accepted, or indorsed in the name of the company by any person acting under the authority of the company, or if made, accepted, or indorsed by, or on behalf, or on account of the company by any person acting under the authority of the company;" 25 & 26 Vict. c. 89, § 47.

(t) Act of 1862; § 18.

personal firm, may sue in the name of the company, without the name of any of the partners being conjoined.¹

(4.) Mercantile companies with descriptive firms sue in name of the partners for behoof of the company, or under the descriptive firm along with at least three individual partners named.^{2(u)}

XII. MOVEABLE REAL RIGHTS, AND DEEDS RELATING TO SHIPS.

532. Where goods sold, but not delivered, are fraudulently sold a second time by the original owner to a subsequent purchaser who obtains delivery; Can the first purchaser insist for the delivery of the goods from the second? State the reason.

The original purchaser cannot insist for delivery of the goods from the second purchaser, if he has acquired them in *bona fide*, and is not a participant in the fraud; the second purchaser, who has obtained delivery, being preferred to the property according to the rule, *traditionibus non nudis pactis, dominia rerum transferuntur*.³ The modification of this doctrine, introduced by the Mercantile Law Amendment Act, applies only to questions arising between the purchaser and the seller's creditors, or between the seller and sub-purchaser, where the goods have been sold, but have been allowed to remain in the custody of the original seller.^{4(x)}

533. A person granted a trust-disposition for behoof of his creditors, by which he assigned his furniture, with an inventory, and was allowed to continue in possession, but an instrument of possession was expedite in favour of the trustee; Was the furniture poindable at the instance of a non-acceding creditor? State the reason.

¹ Forsyth, 18th Nov. 1834, 13 S. 42.

² Ersk. 2, 1, 18.

³ London Shipping Co., 19th June, 1841, 3 D. 1045.

⁴ 19 & 20 Vict. c. 60, §§ 1, 2.

(u) See observations of the Lord Chancellor in *Commercial Bank*, 28th July, 1828, 3 W. & S. 365, where a company was called as defender.

(x) See as to this Act, note (b), under *Ans.* 443.

Yes ; because a conveyance by the owner, although followed by an instrument of possession, but without actual delivery, cannot compete with a poinding at the instance of a creditor.¹

534. Where a house and furniture are conveyed by A to trustees, with a right of liferent of the furniture in favour of B while residing in the house ; Is the furniture attachable by B's creditors ? State the reason ?

It has been held that such a conveyance excludes B's creditors ; on the ground that the fee is in the trustees, and B's possession is in virtue of the liferent.²

535. Can an effectual security be constituted over corporeal moveables which remain in the owner's possession, or are in the hands of a third party ; and if so, what steps are necessary ?

(1.) A conveyance of moveables in security, followed by an instrument of possession, will be effectual against the disponent and his heirs without delivery ; but, as against third parties, no effectual security can be constituted over moveables without delivery, either actual or at least the best which the circumstances will allow.³ The Mercantile Law Amendment Act provides that goods sold but not delivered shall not be attachable by the creditors of the seller ; and it is understood that securities over moveables, *retenta possessione*, made in reliance on that enactment, are sometimes to be met with in practice, but it is thought that the provisions of the Act do not reach the case of securities.

(2.) An effectual security may be constituted over moveables in the hands of a third party by bond and disposition in security, executed with reference to an inventory, and followed by intimation to the custodier.⁴

536. What is the object of the certificate of registry of a ship ; and what particulars must it contain ?

¹ Borthwick, 17th Feb. 1829, 7 S. 420.(y)

See also Young, 26th June, 1855, 17 D. 998.

² Scott, 18th May, 1837, 15 S. 916.

³ Bell's Com. i. 273.

⁴ Eadie, 7th Feb. 1815, F.C.

(y) See also Fraser, 26th June, 1830, 8 S. 982 ; and Gibson, 29th May, 1841, 3 D. 974.

The object of the certificate is to show the nationality, and to provide for the identification of the ship. It must set forth—

- (1.) The name of the vessel, and her port.
- (2.) The details as to the tonnage and build.
- (3.) The master's name.
- (4.) The particulars as to the origin of the ship.
- (5.) The name and designation of the registered owner; and, if more than one, the proportions in which they are interested must be endorsed on the certificate.¹

537. Into how many shares may the property of a ship be divided, and how many individuals may be registered as owners?

Under the Merchant Shipping Act—(1) the property of a ship is divided into sixty-four shares; and (2) not more than thirty-two individuals can be registered as owners; (3) any number of persons not exceeding five may be registered as joint owners of a ship or of a share, but no person can be registered as owner of a fractional part of a share; (4) a body corporate may be registered as owner by its corporate name.²

538. How is the property of a ship or share transferred?

The property of a ship, or of shares therein, is transferred by a bill of sale by the registered owner in the form prescribed by the Act, containing a description of the vessel as set forth in the certificate of the surveyor, or such other description as may be sufficient for the identification of the ship; the bill of sale being executed in presence of and attested by one or more witnesses. After it has been duly executed, it must be produced to the registrar of the port at which the ship is registered, with a declaration in terms of the Act; and he thereupon enters in the register book the name of the transferee as owner, and indorses on the bill of sale the fact of such entry having been made, with the date and hour thereof. The criterion of preference of bills of sale is the date of their record in the register book.³ An entire ship may also be transferred by an agent for the registered owner in a foreign port, in virtue of a certificate of sale obtained by the latter

¹ 17 & 18 Vict. c. 104, § 44.

² *Ibid.* § 55 *et seq.*

³ 17 & 18 Vict. c. 104, § 37.

from the registrar of the port where the ship is registered, but the power must be exercised in conformity with the directions contained in the certificate, and the conditions and provisions specified in the Act.¹

539. How are voluntary securities over ships constituted; and what is the criterion of preference in a competition?

Securities over ships are constituted by—

(1.) Mortgage of the ship by the owners. It must be in the form prescribed by the Act, and registered in the register book of the port at which the ship is registered, a memorandum being made by the registrar on the mortgage of the date and hour of the entry. Mortgages have priority according to the date of their record in the register book.²

(2.) Mortgage of the ship when in a foreign port by an agent of the owners. To entitle an agent to grant such securities, the registered owner must first have obtained from the registrar a certificate for that purpose, called a certificate of mortgage, and before such a certificate is granted, the owner must make a statement—(1) of the name of the person by whom the power is to be exercised; (2) the amount of charge to be created, if that is intended to be limited; (3) the place where the power is to be exercised; and (4) the endurance of the power in point of time; and the statement of these particulars is entered in the register book of the port where the vessel is registered. A record of every mortgage made under the certificate is indorsed thereon by a registrar or British Consular Officer; and every mortgage which is so registered on the certificate has priority over all mortgages of the same ship or share created subsequently to the date of the entry of the certificate in the register book; and if there be more mortgages than one so indorsed, the respective mortgages claiming thereunder are, notwithstanding any express, implied, or constructive notice, ranked one before the other according to the date at which a record of each instrument is indorsed on the certificate, and not according to the date of the instrument creating the mortgage.³

¹ 17 & 18 Vict. c. 104, §§ 76-81.

² *Ibid.* §§ 76-80.

³ 17 & 18 Vict. c. 104, §§ 66, 67, 69.

(3.) Bond of bottomry, granted by the owner for money lent to fit up and supply the ship with necessaries before a voyage, or by the master for repairs and furnishings in a foreign port. It is a condition of such bonds that if the ship be lost, the lender shall lose his money; but that if the vessel safely reach her port of destination, the money lent shall be repaid with a certain profit for interest and risk, called marine interest. The security is over the ship with her appurtenances, and when the bond is granted by the owners themselves, they are personally bound;¹ but when the master borrows money at marine interest, and pledges the ship for repayment, the owners are not personally responsible.² Bonds of bottomry granted by the owner have priority according to their date; but in a competition among the holders of such bonds granted by the master, the last bottomry creditor in point of date has the preference, because *salvam fecit totius pignoris causam*.³

540. What is a bond of *respondentia*?

A bond of *respondentia* is an obligation for the repayment of money lent to the owners of the cargo at home, or to the master for repairs and furnishings in a foreign port; the borrower is personally bound, and also the cargo, but the security does not extend to the ship, and the lender, in consideration of marine interest, runs the risk of the loss of his money by the loss of the cargo.⁴

541. What is the charter-party?

The charter-party is a contract by which the owner, or the ship's husband if in a home port, or the master if in a foreign port, freights the vessel for a defined voyage for a certain sum, engaging that she shall be sea-worthy, properly equipped and manned, and ready at a specified port and time to receive the cargo; that she shall sail at the day appointed, wind and weather permitting; and that the goods shall be safely delivered at the port of destination, the dangers of the seas, &c., being excepted. On the other hand, the freighter engages to furnish the cargo in due time, and pay the freight. [There are three kinds of charter-

¹ Bell's Prin. 452.

² Bell's Prin. 456.

³ Cochrane, 14th Feb. 1854, 16 D.

⁴ *Ibid.* 452 *et seq.*

parties—(1) A demise of the ship ; (2) a letting of the ship, and the service of the crew ; (3) a mere contract of affreightment for the carriage of goods. Abbott, eleventh edit. p. 37.]

[542. What is a bill of lading? Mention some of its properties, and state in what respect it differs from a bill of exchange.

A bill of lading is a document which the shipmaster grants to the shipper of goods, "acknowledging that goods of a particular description have been delivered to him in good condition, and binding himself to deliver them at the port of destination, either to the shipper or his order or assigns, or to the bearer, or to the consignee or buyer by name, or his assignees," 1 M'Laren's Bell's Com. 212. A bill of lading is the "symbol of the goods named in it, and represents them while they are at sea, so that by means of the bill of lading the goods which it represents may be sold or pledged." A bill of lading is transferable by indorsation. But it is not negotiable to the same extent as a bill of exchange, because the indorsee or transferee of a bill of lading acquires no better title to the goods which it represents than the person had from whom he received it. Craig, 6 R. 1269.]

XIII. FACTORY.

543. What is the nature of the powers which a general factory confers ; and what acts require special authority ?

A general factory confers only powers of general management, and authority to perform such acts of ordinary administration as are necessary for the preservation of the estate.¹

Special powers are necessary—

(1.) To sell, feu, or purchase heritage ; or to sell moveables of great value.²

(2.) To enter the constituent as heir to a succession, so as to incur risk by representation. A general factory was formerly held sufficient to serve the granter heir to a lucrative succession ;³ but the Service of Heirs Act [the provisions of which are substantially

¹ Menzies Lect. 454 (472).

² Molle, 13th Dec. 1811, F.C.

³ Ersk. 3, 3, 39.

repeated in the Consolidation Act, 1868], requires that the petition for service shall be subscribed by the petitioner, "or by a mandatory specially authorised for the purpose."¹ A general commission is sufficient for the entry of the granter as heir to a lucrative succession by a precept of *clare constat*.

(3.) To compromise the principal's claims.²

(4.) To submit them to arbitration.³

(5.) To borrow money on the security of the constituent's estate, unless where the loan is necessary for the preservation of the property.⁴

(6.) To delegate the factory.⁵

(7.) To enter vassals and to grant leases.

(8.) The competency of summary diligence against the constituent on a bond granted by the factor is questionable, if the factory does not contain a consent to the registration of such bonds, for the purpose of execution against the constituent himself.

544. How may a factory be terminated?

(1.) By a direct recal.⁶

(2.) By granting a factory to another, which is an implied revocation of the first.⁷

(3.) By the factor's renunciation.⁸

(4.) By the death of the constituent, or by the death of any one of them where there are several.⁹ But the factor's acts are valid until he receives authentic notice of his constituent's death.¹⁰

(5.) By the bankruptcy of the constituent.¹¹

(6.) It is thought that the *permanent* insanity of the constituent operates as a recall;¹² but temporary insanity does not have that effect.¹³

¹ 10 & 11 Vict. c. 47, § 4.

² Hollingworth, 21st Jan. 1813, F.C.; Bridges, 22nd Nov. 1831, 10 S. 43.

³ Livingston, 23rd Feb. 1830, 8 S. 594.

⁴ Thomson, 23rd Dec. 1842, 5 D. 379.

⁵ Dempster, 18th Feb. 1836, 14 S. 521.

⁶ Walker, 18th Dec. 1837, 16 S. 217.

⁷ Ersk. 3, 3, 40.

⁸ Ersk. *ibid*.

⁹ Stewart, 29th Feb. 1832, 10 S. 392; rev. 7th April, 1834, 7 W. & S. 211.

¹⁰ Campbell, 7th Dec. 1826, 5 S. 86, aff. 3 W. & S. 384.

¹¹ Menzies Lect. 456 (474).

¹² Pollock, 10th Dec. 1811, F.C.

¹³ Wink, 8th March, 1849, 11 D. 995.

(7.) By the death of the factor, or where there are several, by the death(*a*) of any one of them, if no quorum is named.¹(*b*)

545. In what cases does a factor incur personal responsibility to third parties?

(1.) He will be personally liable for acts not done *nomine factoris*; or

(2.) When he acts *ultra vires*.²

546. Where the factory contains a power of delegation, is the principal factor relieved from responsibility for the person whom he appoints?

Yes; if he had reasonable grounds for believing the sub-factor to be solvent at the time of his appointment.³

547. What degree of diligence is incumbent on the factor?

(1) Where he acts without recompense, he is liable only for actual intromissions, or for such diligence as he employs in his own affairs. (2) Where he exceeds his powers, he will be liable for the consequences to his constituent; and if the acts done beyond his mandate be such as to bind his constituent, he will be directly bound to indemnify the latter. (3) Where he is remunerated, he is bound to act with the care and discretion of a man of ordinary prudence, and *culpa levis* will ground responsibility.⁴

¹ Ersk. 3, 3, 40.

³ Bell's Prin. 223.

² Ersk. 3, 3, 35; Ainslie, M. 4065; Crawford, M. 4066.

⁴ Ersk. 3, 3, 36 and 37; Bell's Prin. 234.

(*a*) Or resignation.

(*b*) Or if they are not appointed to act in succession.

PART III.—HERITABLE RIGHTS.

I. THE FEUDAL SYSTEM—CASUALTIES OF SUPERIORITY, ETC.

548. Give an outline of the origin and nature of the Feudal System.

A resemblance of the Feudal System is to be found in particular stages of the history of Greece and Rome, and in the customs of various nations and races both in the Old and in the New World ; but the system, in its mature form, may be said to be the result of the state of society at the time of the fall of the Roman Empire, and the events which then took place. The several barbaric tribes who overthrew the empire, having cantoned themselves out into the countries which they had seized, continued arranged under their own officers, each of whom had a separate territory allotted to him, on which he could retain and support his immediate followers, the largest allotment being assigned to the principal leader ; and in this way all were bound in allegiance, both to their immediate superiors and to their chief, and all were in readiness to be called out to arms whenever their services were required. The policy of this system, says Mr. Erskine, was so universally approved in that military age, that, even after an end was put to the reign of the Lombards in Italy, it was adopted by Charles the Great, and by most of the princes of Europe.¹ The essential elements of the feudal system were thus LAND—with the protection of the vassal on the one hand, and, on the other, fidelity and military service to the superior of whom the grant was held ; and although the tenure has now been adapted, perhaps as far as it is capable of being so, to the wants of civilised times, the funda-

¹ Ersk. 2, 3, 3 ; Ross Lect. ii. 23 *et seq.* ; Menzies Lect. 482 (502) *et seq.*

mental principle still remains, that the property of land is held either directly and immediately under the Crown, as paramount superior, or indirectly under a Crown vassal, or a sub-vassal in a more subordinate degree.

549. Name the three great stages into which the progress of feus is divided by Sir Thomas Craig in his *Jus Feudale*, with their respective periods and characteristics.

(1.) The *infancy of feus*; when they were precarious or revocable at the granter's pleasure, which was their primary characteristic.

(2.) The *childhood of feus*; when they were for life, which prevailed from the middle of the seventh till the end of the ninth century.

(3.) The *manhood of feus*; when they become hereditary. Under Charlemagne feus were made descendible to children and grandchildren in the direct line; and by the Emperor Conrad, in 1026, they were made transmissible to collaterals.¹

550. What are the date and contents of the Styles of Marculfus; and what was the first institute of the feudal law; by whom was it compiled, and chiefly from what source?

(1.) The Styles of Marculfus, who was a French monk, were published about the year 660, and they consist of two books, the first containing *Preceptiones Regales*—i.e., royal precepts or grants; and the second, *Chartæ Pagenses*—i.e., charters belonging to the country, or writings of country affairs.²

(2.) The first institute of the feudal law was the *Consuetudines*

¹ Craig, 1, 4, 5 *et seq.*; Ross Lect. ii. 38 *et seq.*; Menzies Lect. 489 (509). A writer in the *Journal of Jurisprudence*, in an able and instructive article on "Feudalism" (ii. 220), somewhat facetiously completes Sir Thomas' metaphor thus:—"The barter of warlike for agricultural services was the act of *senility*,

lazy and detesting trouble and personal discomfort; the receipt of money for feu-holding was *decrepitude*; and the legislative abolition of ward-holding, or holding on condition of military service, was *death*.

² Ross Lect. ii. 72; Menzies Lect. 486 (506).

Feudorum, or the Book of the Feus, compiled in the twelfth century, chiefly from the customs of the Lombards.¹

551. What is the order in which the different authorities on feudal questions are resorted to?

(1) Statutory law; (2) common law; (3) the laws and customs of other nations observing feudal institutions; and (4) the *Consuetudines Feudorum*.²

552. When was the feudal system introduced into Scotland; and what cause principally led to its extension?

It is generally supposed that the feudal system was introduced into Scotland in the eleventh century, and subsequent to the Norman Conquest. The cause which principally led to the extension of the system was the insecurity of the proprietors of allodial property, who, while they had the absolute power of disposal, and recognised no superior, were unable to defend the possessions of their property against hostile attacks in an age of violence, and were consequently induced, for their own protection, to resign their estates into the hands of the powerful barons, receiving back the lands in the form of a feudal grant. Allodial proprietors, also, whose title-deeds had been lost by the ravages of war, or consumed by fire, resigned their lands into the hands of the sovereign, and obtained a feudal recognition of their title; and a large extent of land which had been bestowed on the church was feued out to vassals for an annual payment, or for military services.³

553. What classes of property are excepted from the operation of the feudal system in Scotland?

(1.) Rights reserved to the Crown out of lands feued to subjects; as gold and silver mines, forestry, and salmon fishings.

(2.) The patrimonial estate of the sovereign—lands, castles, palaces, &c.

(3.) The principality of Scotland belonging to the sovereign's eldest son, as Prince and Steward of Scotland.

(4.) The Crown's superiority of lands belonging to subjects in property.

¹ Ross Lect. ii. 38; Menzies Lect. 490 (510).

² Menzies Lect. 494 (514).

³ Ross Lect. ii. 16, and 56 *et seq.*; Duff's Feud. Conv. 41, 43; Menzies Lect. 490 (510).

(5.) Church property—churches, churchyards, manses and glebes.

(6.) Lands in Orkney and Shetland held by udal tenure.¹

554. What was the ancient method of constituting the feudal relation, and what were the progressive steps leading to the modern form of investiture?

(1.) The feudal relation was anciently constituted by the superior in person delivering possession to the vassal upon the ground of the feu, in presence of the *pares curiæ*, which was called the *proper investiture*. Although writing was not necessary, sometimes the superior, after the ceremony, delivered to the vassal a *breve testatum*, attesting the fact of delivery.

(2.) As the personal attendance of superiors was not always convenient, the practice was introduced of their executing a mandate or precept before possession was given, directing their commissioner or bailie to invest the vassal; and the investiture was completed by the delivery of possession to him in virtue of the precept. But the precept was no evidence of the right, unless the bailie's seal was appended to it, in token of possession having been given, or unless the bailie gave a separate certificate attesting the fact of delivery. This was termed the *improper investiture*.²

(3.) The next step was the charter, with a separate precept, and afterwards the charter and precept combined, followed by symbolical delivery, which was attested by the instrument of sasine.

(4.) The institution of the registers for publication was the next advance towards the modern form of investiture, one of its essential elements having been thereby introduced. Thus the requisites of investiture at this stage were—(1) the grant; (2) symbolical delivery on the ground; (3) evidence of delivery by the instrument of sasine; and (4) publication of the right by registration.

(5.) Symbolical delivery was abolished by the Infestment Act of 1845.

(6.) By the Titles to Land Act, 1858, the sasine was dispensed

¹ Ersk. 2, 3, 8; Menzies Lect. 496 (516).

² Ross Lect. ii. 120; Menzies Lect. 508 (528).

with, and registration of the charter introduced as an equivalent; so that the requisites of a complete investiture now are—(1) the grant; and (2) publication of it by registration. [The provisions of the 1858 and 1860 Acts are substantially re-enacted by the Consolidation Act.]

555. Enumerate the feudal holdings, and mention which of them still subsist?

There were originally five kinds of holding, viz.—(1) ward-holding; (a) (2) feu; (3) blench; (4) burgage; and (5) mortification. Of these, feu, blench, and burgage alone subsist.

(1.) Ward-holding, the ancient military holding, was once the prevailing tenure of the feudal law, so that when no holding was expressed, ward was presumed. The reddendo, or fixed return, expressed in the grant, was *servitia solita et consueta*, being military and personal services. (b) This holding was abolished by the Act 20 Geo. II. c. 50.

(2.) Feu-holding, now the prevalent tenure, is where lands or other feudal property are granted in perpetuity for a reddendo of money, grain, or agricultural services.

(3.) Blench-holding, originally the holding expressed in grants bestowed *ob præclara in rempublicam merita et partam bello gloriam*, is where the reddendo is nominal or illusory, as a pair of gilt spurs, a pound of wax, or a penny, *si petatur tantum*. In other respects it resembles feu-holding.

(4.) Burgage is a species of military holding, peculiar to royal burghs. The sovereign is superior, each proprietor holding directly of the Crown for the service of watching and warding, the magistrates being the Crown's commissioners in renewing investitures. [The Conveyancing Act, 1874, enacts, section 25—"there shall not, after the commencement of this Act, be any distinction between estates in land held burgage and estates in land held feu, in so far as regards the conveyances relating thereto, or the completion of titles." Burgh registers are retained.]

(a) Also soccage. See note (b), below.

(b) As the military service incumbent on the vassal in ward-holding interfered with agriculture, landholders, to remedy the inconvenience, made grants of small parcels of land on condition that the grantee should cultivate and sow the granter's lands retained in his own possession. The holding in these grant was called Soccage; Ersk. 1, 1, 85, and 2, 4, 5.

(5.) Mortification was a kind of religious holding, chiefly used in making grants of land to the church, or in the endowing of hospitals, &c., the reddendo being *preces et lacrymæ*. This tenure was abolished at the Reformation, and mortified lands were transferred to the Crown.¹

556. Give a definition of the word "feu," and state the supposed origin of the term.

A feu is a grant of lands, or other property connected with land, in perpetuity, on condition of the grantee rendering an annual or periodical return of some description to the granter, the radical right remaining with the latter. The origin of the term is disputed, some deriving it from *fides*, and others tracing it to the Norse, "*fee*" a reward, and "*odh*," property. Sir Thomas Craig gives a derivation which appears to have, at least, the merit of being the most fanciful, namely, the initial letters of the words composing the oath of fidelity, *Fidelis ero ubique domino vero meo, F. e. u. d. u. m.*²

557. What is the meaning of the terms *dominium directum*, and *dominium utile*?

The *dominium directum* is the superiority, or the radical right which remains with the superior after the constitution of a feudal grant. The *dominium utile* is the property, or the vassal's estate.

558. Of what does the superior's estate, or *dominium directum*, consist?

The superior's estate consists of—(1.) The radical right to the lands; in virtue of which, on certain events, he may re-acquire the full right of property.

(2.) The feu or blench duties, or lawful services stipulated for in the charter.

(3.) The casualties of superiority.³ [By the Conveyancing Act, 1874, section 23, it is enacted that, in feus granted after the commencement of the Act, "it shall not be lawful to condition or stipulate for any casualty to be paid on the succession of an heir

¹ Ersk. 2, 4, 1, *et seq.*; Bell's Prin. 680; Menzies Lect. 501 (521).

45; Menzies Lect. 499 (519); Craig, 1, 9, 2.

² Ersk. 2, 3, 7; Duff's Feud. Conv.

³ Bell's Prin. 690.

or the acquisition of a singular successor, or in any way except at fixed intervals."]

559. Of what does the vassal's estate, or *dominium utile* consist?

The vassal's estate consists of the right of property and exclusive use of the lands, and the pertinents, whether above or below the surface, with the absolute power of disposal, and all the legal privileges belonging to the lands; but the vassal acquires no right to the regalia, unless expressly granted to him.

560. Enumerate the casualties of superiority; and mention which of them still subsist.

(1.) Ward; by which the superior was entitled to the full rent of the lands after the vassal's death, during the heir's minority; because the heir in that period was incapable of performing military service. It was sometimes restricted by the investiture to a certain sum, to be paid annually by the minor heir, in place of the full rents. This was called *taxed ward*, and when not restricted it was termed *simple ward*.

(2.) Recognition; which was the forfeiture of the lands to the superior in the event of the vassal alienating more than the half of them to a stranger, without the superior's consent.

(3.) Marriage; which arose from the superior's right to choose a wife for his vassal and entitled him to a sum equal to a suitable tocher, called the *single avail* of marriage, if the vassal accepted of the superior's choice, or married without his interference. If the vassal rejected the wife selected for him by the superior, the latter was entitled to double the amount of a suitable tocher, called the *double avail*.

(4.) Disclamation; by which a vassal forfeited his whole feu to the superior, if he disowned or disclaimed him as to any part of it.

(5.) Purpresture; which involved a forfeiture of the whole feu, and was incurred by the vassal encroaching upon any part of the superior's property.

The first three casualties above enumerated were abolished by 20 Geo. II. c. 50, and the fourth and fifth have been long in desuetude. The following are the subsisting casualties:—

(1.) Irritancy of the feu *ob non solutum canonem*; which in-

volves a tinsel or forfeiture of the feu by the vassal neglecting to pay the feu-duties for two full years. Before the Act 1597, c. 250, it was not unusual to introduce this irritancy into the title, but by that statute it was made a condition of all feus, it being thereby declared that, if the feu-duty remain unpaid for two full years, the vassal should amit and tyne his feu in the same manner as if there had been an irritant clause in the right.

(2.) Non-entry ; which arises from the superior's right to have a vassal feudally vested, and is incurred through the heir's neglecting to renew the investiture after his ancestor's death. By ancient usages the feu was forfeited to the superior if the heir neglected for a year and day to enter after the vassal's death. The non-entry duties exigible by modern practice are—(1) before citation in an action of declarator of non-entry, the feu-duties in feu-holdings ; the retoured duties in blench-holdings ; and one per cent. of the valued rent in Crown-holdings changed from ward to blench ; and (2) after citation, the full rents, whatever be the nature of the holding. But if the vassal can plead a reasonable excuse for the delay, he will not be subjected in payment of the full rents, which are usually awarded only from the date of the decree. [Non-entry is abolished by the Conveyancing Act, 1874, § 4, sub-sec. 4, and a form is provided (Schedule B) of a Summons of Declaration for payment of a casualty.]

(3.) Relief ; which is the consideration or price paid by the vassal's heir to the superior for granting a renewal of the investiture, on the death of the ancestor, being a year's feu or blench duty, in addition to the duty payable for the year. [See as to feus after 1st October, 1874, *Ans.* 558.]

(4.) Composition ; which is the consideration paid by a singular successor for an entry, being a year's rent, under deduction—(1) of the feu-duty and annual burdens imposed with the superior's consent ; (2) of a reasonable allowance for annual repairs ; (3) of public burdens ; and (4) one-fifth for teind, when the superior is not proprietor of the teinds.(c) [See as to feus after 1st October, 1874, *Ans.* 558.]

(c) In reference to the casualties of relief and composition, the case of *Dixon*, 3rd March, 1858, 20 D. 721, may be mentioned. Here a property was bought for a price, either to be converted into a feu-duty or partly to be paid, the transaction to take the shape of a feu-contract, but to be dealt with on the

(5.) Escheat ; which is a forfeiture of the vassal's liferent of the feu, and arises—(1) by sentence of death and escape ; and (2) by the vassal's remaining a year and day at the horn unrelaxed after denunciation for a crime. The liferent falls to the superior, except where the denunciation proceeds upon treason or rebellion, in which case the fee, as well as the liferent, is forfeited to the Crown.¹(d)

561. Is there any distinction betwixt the legal and a conventional irritancy *ob non solutum canonem*, with respect to the vassal's right of purgation ?

It is a general rule that irritancies are purgeable before decree of declarator is extracted ;² but in the case of a strict conventional irritancy in a feu-charter, purgation may not be allowed at the bar, without at least some justification or colourable excuse for the delay.³(e)

562. Where a superior insists on forfeiture of the feu, may he also claim the arrears of feu-duty ?

No ; because, by decree of declarator of tinsel, the feu is annihilated, and the ground of the claim for arrears removed.⁴(f)

¹ Ersk. 2, 5, 5, *et seq.*; Ersk. Prin. 2, 5, 2 *et seq.*; Bell's Prin. 701 *et seq.*; Menzies Lect. 503 (523) *et seq.*

² Ersk. 2, 5, 27 ; Menzies Lect. 504 (524).

³ M'Vicar, M. 15095 ; Mags. of Edin. 16th May, 1834, 12 S. 593.

⁴ More's Notes, 80, 206 ; Bell's Prin. 701.

footing of a purchase. Held that the entry of heirs and singular successors must be taxed at a nominal sum, but the purchaser to relieve the seller of the feu-duty and other prestations exigible from him by his superior.

(d) This escheat is called Liferent, to distinguish it from single escheat, which applies to moveables. The incurring of this forfeiture does not affect the vassal's right to the fee or his power of disposing of it, in so far as he can do so without prejudice to the rights of those who may have an interest in his single or liferent escheat ; Macrae, 22nd Nov. 1836, 15 D. 54 ; aff. on appeal, M'L. & Rob. 645.

(e) A decree obtained under the statute alone (the opportunity of purging at the bar having been neglected) cannot afterwards be reduced on tender of payment ; Ballenden, M. 7252.

(f) He can claim, however, a composition, previously incurred, for an entry though the charter had not been taken out ; Mags. of Edinburgh, *supra*, note 4.

563. In what cases are the lands in non-entry ?

(1.) Where the vassal's heir neglects to renew the investiture after his ancestor's death.(g) [Infestment now implies entry with the nearest superior, Conveyancing Act, 1874, § 4 ; sub-sec. 2 and by § 4, sub-sec. 4, it is enacted that no lands after 1st October, 1874, are to be deemed to be in non-entry.

(g) It does not seem to be settled whether or not lands held by heirs-portioners fall partially into non-entry on the death of one or more of them ; but on the principle that the superior is entitled to have a vassal entered, and the analogous case of *pro indiviso* proprietors (Scott, 18th July, 1863, 1 M'P. 1164), it should rather seem that they do.

By 6 Geo. IV. c. 86, the trustees for public buildings were empowered to purchase property in Edinburgh for the accommodation of the courts, and a statutory form of conveyance was appointed, which, being registered, should be " a complete bar to all other rights, titles, trusts, and interests and incumbrances to, in, or upon the same whatsoever." Held that such a conveyance did not extinguish the estate of the superior where the party granting the conveyance had right only to the *dominium utile*, but that it left the *dominium directum*, with all its profits and casualties, entire, and therefore that on the death of the vassal the subjects were in non-entry ; Maga. of Edinburgh, 8th June, 1860, 22 D. 1160.

By the 13 Vict. c. 13, it is provided (§ 1) " that wherever heritable property, consisting of lands or houses in Scotland, has been or may be hereafter acquired by any congregation or society or body of men associated for religious purposes, or for the promotion of education," as a place of worship, manse, school, schoolmaster's house, college, seminary, or hall for the transaction of the business of such congregation or society, &c.; and where the conveyance or lease is taken to the managers, &c., of such congregation, &c., or trustees for the time being, such title shall not only vest the parties named therein in the lands, &c., thereby conveyed or leased, but shall, after their death or resignation, effectually vest their successors in office for the time being in such lands, &c., " and that without any transference, assignment, conveyance, or other transmission, or renewal of the investiture whatsoever." By § 2 it is provided that, where not otherwise arranged, " it shall be lawful for the superior, at the death of the existing vassal in such heritable property, and at the expiration of every period of twenty-five years thereafter, so long as such heritable property shall belong to or be held for behoof of such congregation," &c., to demand " a sum corresponding to the casualty or composition, if any such shall in the circumstances be due, which would have been payable upon the entry of a singular successor therein," and that in full of all casualties of entry and composition. If the composition is not taxed, and the property is not situated in or in the immediate vicinity of a town or village, the casualty or composition payable therefor is held to be the annualrent or value of the land, if let as an agricultural subject. By the Titles to Land (Scotland) Act, 1860, § 32, the

(2.) Where the heir's service and infeftment are reduced.

(3.) The lands continue in non-entry where, after the vassal's death, the heir or a singular successor has obtained a precept or charter(*h*) from the superior, but delays to take infeftment on it, or to record it in the Register of Sasines.

(4.) It is said that the non-entry duties are exigible where the vassal has resigned *in favorem*, but the new vassal does not take infeftment on the charter.¹

564. In what circumstances was non-entry excluded ?

(1.) During the life of the last entered vassal, although he has been divested of the *dominium utile* by a feudalised conveyance.

(2.) Where the lands are subject to terce, non-entry is excluded after the husband's death to the extent of a third during the life of the widow ; and where subject to courtesy, it is excluded after the wife's death as to the whole during the husband's life.

(3.) By an infeftment in conjunct fee and liferent, granted by a husband to his wife, and confirmed by the superior, non-entry is excluded until the death of the survivor.

(4.) Where the lands have been conveyed by the *fiar* under burden of a reserved liferent, non-entry is excluded during his life.(*i*)

(5.) Non-entry duties are not exigible when the superior is in non-entry, or has refused to give an entry.

(6.) It is doubtful whether non-entry is excluded by a sub-feu confirmed by the superior.²

¹ Ersk. 2, 5, 30 ; 2, 7 ; 24 ; Bell's Prin. 705.

² Ersk. 2, 5, 44, 45 ; Duff's Feud. Conv. 477.

provisions of the Act above referred to are extended "to all trusts for the maintenance, support, or endowment of ministers of religion, missionaries, or schoolmasters, or for the maintenance of the fabric" of places of worship, manses, schools, &c., and declared to apply to the Established and all other Presbyterian churches in Scotland. [See the Consolidation Act of 1868, § 26.]

(*h*) Or writ.

(*i*) In this case, the *fiar* being assumed to be *alive*, the lands are not in non-entry.

II. ORIGINAL CHARTER.

565. Enumerate the clauses of the charter.

[(1) The narrative, containing the names of the grantor and grantee, and cause of granting; (2) the dispositive clause, containing the words of conveyance [the word “dispone” is not now essential, though in practice retained (Conveyancing Act, 1874, § 27)], the destination to heirs, the description of the subjects, and the reservations, burdens, and conditions; (3) the term of entry; (4) the *tenendas*; (5) the *reddendo*; (6) assignation of writs; (k) (7) assignation of rents; (8) obligation to free and relieve the grantee of (l) public burdens; (9) clause of warrandice; (10) clause of registration; (11) precept of sasine (now unnecessary); (12) testing clause.¹

566. What is the ruling clause of a conveyance of heritage, and what is essential in it (m)

The dispositive is the ruling clause; it must contain words of conveyance *de presenti*, and the word “dispone” appears to be indispensable.²(m) [Section 27 of the Conveyancing Act, 1874, enacts that “it shall not be competent to object to the validity of any deed or writing as a conveyance of heritage, coming into operation after the passing of this Act, on the ground that it does not contain the word ‘dispone’: provided it contains any other word or words importing conveyance or transference, or present intention to convey or transfer.”]

567. What is the effect of the omission of the words “heirs and assignees” in the destination of the charter?

¹ Jur. St. i. 11. ² Ogilvie, M. 3340, aff. 1 Ross Lead. Cas.,(n) 1 *et seq.*(o)

(k) But only to the effect of maintaining and defending the vassal's right.

(l) This obligation should include also feu-duties and casualties payable to the grantor's superiors.

(m) This question and answer altered from original.

(n) Land Rights, 13 *et seq.*

(o) See also Galloway, 12th Jan. 1802, F.C., and Lord Meadowbank's opinion, reported 3rd March, 1815, Hamilton, F.C. :—“If there is a word in Scots law language which is technical, it is *dispone*,” &c.; also Crawford, 14th Jan. 1774, and Henderson, 10th June, 1795, F.C.

Anciently, fees were personal, unless heirs were expressed, and inalienable without the superior's consent, but they are now hereditary and transmissible without express mention of heirs and assignees.¹

568. Where the real proprietor executes only as *consenter* a charter by one who had no right to the lands, Is the deed an effectual conveyance? State the reason.

It has been held that the consent of the proprietor to a disposition *a non domino* implies a conveyance of the property, on the principle that such consent can have no other intention or meaning;² but this doctrine is doubted by Baron Hume;³(*p*) and in any view, it would be highly improper to take a charter in that form, because there is no implied warrandice against a consenter, and consequently he is not barred from insisting in rights which may subsequently emerge in his favour, although injurious to the grantee.⁴

569. What is the effect of a consent by an heritable creditor in a conveyance by the true owner?

Consent by an heritable creditor imports only *non repugnantia*, and that he will not, on the ground of the debt, compete with the purchaser, but allow him a preference to the consenter's rights, though otherwise they might be preferable to those acquired by the purchaser. But it does not imply a conveyance(*r*) of the creditor's debt to the purchaser, or a right to use it in support of his own title.⁵

570. A married woman, who had consented to her husband's disposition of lands to a purchaser, subsequently

¹ Duff's Feud. Conv. 61.

⁴ Stuart, M. 7762; Menzies Lect.

² Buchan, M. 6528; Mounsey, 29th Nov. 1808; Hume 237.

513 (531).

⁵ Buchan, M. 6529.

³ Hume 237.

(*p*) The doctrine is expressly laid down by Stair, 2, 11, 7, who refers to Craig; and Hume, in the passage referred to, concludes—"Probably, however, the present case, joined to Lord Stair's opinion, and that also of Kilkeran, who transiently delivers the same law (p. 279, No. 2), ought to lay this question to rest."

(*r*) Nor an obligation to grant a conveyance.

acquired from a third party a preferable right of liferent, secured out of the same lands upon which she was infeft before the disponee; Is her right preferable to the purchaser's?

The wife's liferent is preferable; because being a consenter she was not the author of the purchaser's right; and consequently the rule *jus superveniens auctori accrescit successori*, is not applicable.¹

571. Where the disponent alleges, after delivery of the charter, that the price has not been paid, How is the allegation to be proved?

It can be proved only by the writ or oath of the disponee;² but if the disponee admits that the price was not paid at the time, he must prove actual payment.³

572. On the failure of heirs, does the estate revert to the superior?

On the failure of heirs the estate falls to the Crown as *ultimus hæres*; the superior, by completion of the vassal's title, being for ever divested of the grant, unless it contains a clause of return.

[573. State generally the provisions of the various Titles Acts, 1874, with respect to the description of the lands in conveyances.

The first enactment allowing description by reference was in the 1858 Act. The leading requisites in it were specification of—(1) “The leading name or names, or other short distinctive description; (2) the county or parish, or supposed parish; (3) a reference to a prior recorded conveyance, containing a particular description in the manner prescribed by a schedule to the Act. The Act of 1860 repealed this enactment; made it unnecessary to specify ‘the leading name,’ &c., and not requisite to give the parish, but

¹ Forbes, M. 6524; Stuart, M. 7762.

² Gordon, 11th June, 1833, 11 S. 696.

³ Hotson, 7th June, 1831, 9 S. 685.

only the county or burgh, and a reference to a recorded deed. The Consolidation Act, 1868, substituted for the provisions of the Act of 1860 the following points:—(1) *Some* leading name or names, or some other distinctive description; (2) name of county or burgh; (3) reference to a recorded deed or instrument. The Conveyancing Act, 1874, § 61, repeals the provision of the Consolidation Act, and provides that where lands have been particularly described in any conveyance, &c., relating thereto, recorded in the appropriate register of sasines, it is not to be necessary in any subsequent conveyance, &c., referring to the whole or any part of such lands, to repeat the particular description of the lands; but it is to be sufficient to specify the name of the county, and where the lands were held by burgage or by any similar tenure, the name of the burgh and county in which the lands are situated, and to refer to the particular description of such lands as contained in such prior conveyance, &c., so recorded in or as nearly as may be in the form of Schedule (O). The reference in any such subsequent conveyance, &c., is to be held to be equivalent to the particular description contained in such prior conveyance, &c. It is also made incompetent to object to descriptions by reference, on the ground of non-compliance with the repealed section of the Consolidation Act, provided they embrace the requisites of the Conveyancing Act.]

[574. State shortly the provisions of the Consolidation Act, § 13, as to designing lands by a “general name.”

(1) Where several lands are comprehended in one conveyance in favour of the same person or persons, it is to be competent to insert a clause declaring that the whole lands conveyed, and therein particularly described, shall be known in future by one general name; (2) on the conveyance containing such clause, or on an instrument following thereon, and containing such particular description and clause, being recorded in the appropriate register of sasines, it is to be competent in all subsequent conveyances, &c., of or relating to such several lands, to use the general name specified in such clause; (3) provided that reference is made in such subsequent conveyances, &c., to a prior conveyance, &c., in which such particular description and clause are contained; (4) provided also that it is not to be necessary in such clause to comprehend under one general name the whole lands

contained in the conveyance in which such clause is inserted, but that it is to be competent to comprehend certain lands under one general name, and certain other lands under another general name, it being clearly specified what lands are comprehended under each general name; (5) such reference is to be in or as nearly as may be in the terms set forth in Schedule (G) annexed to the Act.]

575. Was it necessary in all cases, before the Titles to Land Act came into operation, to insert a particular description of the lands in the charter, in order directly to obtain a real right under it?

In the general case it was necessary to insert a particular description; but it was not requisite in conveyances of baronies or old estates which had not been subdivided, in which cases the general name was sufficient. A real right could be completed on a general conveyance of all lands belonging to the granter, if it contained a precept of sasine, by producing to the notary the granter's infestments.¹(z)

576. Is it necessary to name the parish and county in which the lands are situated in describing them in a conveyance?

It is not necessary where the full description is given; (a) but where the lands are described by their leading names, and by reference to a prior recorded writ, in terms of the provisions of the Titles to Land Act, the name of the parish and county is indispensable. (b). [The parish is now unnecessary. See Answer 572.]

577. What is a *charta extensa*; and how may it be constituted?

¹ Duff's Feud. Conv. 62; Menzies Lect. 520 (541); see Ans. 644.

(z) Provided they were read and published and stated in the instrument; Graham's Crs., M. 49; Wallace, M. 6919.

(a) Professor Menzies seems rather to imply that the county, though not the parish, is essential; p. 527 (1st ed.).

(b) The Titles to Land Act, 1860, § 34, and Schedule (H), required only the county to be specified.

Where the grant is described by its limits, it is called *charta extensa*, or a bounding charter.¹ It may be constituted (1) by express boundaries ;² (2) by reference to a plan(c) for the boundaries ;³ (3) by measurement, when limited by the taxative word *only* ;⁴ (4) where the lands are described as lying within a certain parish, the title is a bounding charter with respect to lands lying beyond the parish.(d)

578. What is the effect of a bounding charter, as regards exterior rights ?

(1) A bounding charter precludes the grantee from acquiring a right of property in any subject lying beyond the boundaries, for although there were possession from time immemorial, it would be in the face of the title [See Reid, 7 R. 84.] ;⁵(e) (2) but it does not prevent the acquisition of servitudes beyond the boundaries ;⁶ (3)

¹ Ersk. 2, 6, 3.

⁵ Ersk. 2, 6, 3.

² Gordon, 12th Nov. 1850, 13 D. 1.

⁶ Beaumont, 11th July, 1843, 5

³ Menzies Lect. 523 (545).

D. 1337.

⁴ Duff's Feud. Conv. 63.

(c) In a judicial sale by lots, plans had been prepared marking out the boundaries, and were specially referred to in the proceedings ; the articles of roup gave a different description of the lots. Held in Court of Session and House of Lords that the boundaries shown on the plans were the march between the parties ; Glassel, 5 Pat. App. 104. A proprietor had a feuing plan prepared, on which the areas of the houses were delineated as bounded by straight lines from front to back ; he afterwards built some of the houses, and inclosed the back areas with walls running in lines different from those on the plan, one of which was sold, and described in the conveyance as the area , shown on the plan, and bounded by the existing mutual walls. Held that the walls formed the boundaries ; Paterson, 17th May, 1851, 13 D. 997.

(d) See Gordon, *supra*, note 2, and Hepburn, 25th Nov. 1823, 2 S. 525.

(e) A piece of shore ground wholly within high-water mark, described by measurements in length and breadth on all sides, superficial contents and boundaries, was feued, "with power to gain the same off the sea." A bulwark beyond one of the boundaries was erected, and possession of forty years of ground beyond the boundary alleged. Held that it was a bounding title, and observed, *per* Lord Ardmillan, "that if the measurement, taken along with the specification of certain boundaries, brings out precisely the whole of the boundaries, so as to make the space inclosed a matter of certainty, then there is a bounding title ;" Stewart, 12th Jan. 1866, 4 M'P. 283. See also North British Ry. Co., 19th Dec. 1862, 1 M'P. 200.

neither does it preclude a conterminous proprietor, whose boundaries are not limited, from acquiring by prescriptive possession a right of property in part of the lands comprehended in the bounding charter.¹

579. Where the boundary of the grant is the sea, or the full sea, or the sea shore, or the flood mark, Has the proprietor a right in the shore?

Where the boundary is by the sea or the sea shore, the grant is construed to include the shore subject to the use of the public.^(g) But where the boundary is by the full sea, or the flood mark, the grantee has no right to the shore.² [Hunter, 7 M'P. 899.]

580. Heritable subjects were sold, described in the articles of roup as consisting of a certain number of acres; What are the rights of parties on its being found that the subjects exceeded the measurement?

(1) Where the subjects are described by boundaries, as well as by measurement, the former determine the extent, the latter being merely demonstrative.³ [See in confirmation, Gibson, 7 M'P. 394.]

(2) But where the measurement is limited by the word *only*, or if

¹ Ersk. 2, 6, 3.

582; Smith, 13th July, 1849; 6 Bell's App. 487.

² Bell's Prin. 643; Berry, 10th Dec. 1840, 3 D. 205; Mags. of St. Monance, 5th March, 1845, 7 D.

³ Ure, 26th Feb. 1834, 12 S. 494; Fleming, 12th June, 1841, 3 D. 1015.

(g) *Foreshore*.—A party who proposed to erect a pier *ex adverso* of his lands, after getting the consent of the Admiralty, was required by the Crown to take a conveyance of that part of the foreshore required for the purpose, which he declined to do. Whereupon the Crown brought an action to have it “declared that the soil and ground of the coasts and shores of the sea round Scotland below high-water mark of ordinary spring tides, so far as the same have not been granted to any of our subjects by charter or otherwise, belong to us *jure coronæ*, and form part of the hereditary revenues of the Crown in Scotland.” Pleaded for defender that he had acquired right to the shore—(1) by prescription, as part and pertinent of his lands, under a barony title with clause of parts and pertinents; (2) by possession by beaching and unloading vessels, collecting sea ware, erecting fences, &c. Answered for the Crown—the shore is a pertinent not of the land but of the sea, and therefore cannot be carried along with the adjoining lands by a clause of parts and pertinents. Held by Lord Jerviswoode, and acquiesced in, that the defender had acquired right to the shore; Lord Advocate v. Maclean, 23d May, 1866, Scot. Law Rep. p. 25.

it be otherwise proved that the measurement formed an essential condition of the sale, it is taxative, and the seller will be entitled to set aside the sale, or to demand an increased price on its being found that the subject exceeded the measurement.¹(*h*)

581. What are the requisites in order to prescribe a right of property in a separate subject, under a title with parts and pertinents?

Possession—(1) from time immemorial, or at least for forty years;² (2) as of property not by way of servitude;³ (3) in virtue of the title to the principal lands;⁴ (4) the title being unlimited.⁵(*i*)

582. What rights *inter regalia* may be granted by the Crown to a subject?

The *majora regalia*, such as the royal prerogative and the sovereign's right of superiority, are uncommunicable to subjects; but several of the *minora* may be acquired by individuals by express grant or by prescription, such as baronial jurisdiction, (*k*) forestry, (*l*) salmon fishings, (*m*) gold and silver mines, &c.⁶

583. What is necessary to give a right to trout and salmon fishings?

(1.) The right of trout fishing is a pertinent of the lands *ex*

¹ Hepburn, M. 14168.

⁴ Dunbar, M. 10817; Scott, 15th

² Ersk. 2, 6, 3; *Ibid.* 3, 7, 4.

Feb. 1827, 5 S. 367.

³ E. of Fife's Trs., 25th Jan. 1831,
9 S. 336.

⁵ Ersk. 2, 6, 3.

⁶ Ersk. 2, 6, 16.

(*h*) In Hepburn's case the challenge was on the ground of essential error. The sale (which was judicial) seems to have been, not by measurement, but by reference to a proven rental which did not include the whole lands, and the option given was to the purchaser either to take the restricted portion or to give up the purchase.

(*i*) *Parts and pertinents*.—Property held to have been so acquired; Lord Advocate, 31st Jan. 1865, 3 M'P. 426. See also Lord Advocate note (*g*), p. 276. Opinion by majority of the whole judges that lands extending to more than 800 acres, and formerly held under a separate title, had been merged in a larger estate by possession as part and pertinent during the years of prescription; Dalrymple, 10th March, 1841, 3 D. 837; but held in a subsequent case that that possession had not the effect of including them in an entail under the title and denomination of that larger estate; King, 28th Feb. 1844, 6 D. 821.

(*k*) Ersk. 1, 4, 25, and 29.

(*l*) Ersk. 2, 6, 14.

(*m*) Ersk. 2, 6, 15.

adverso, and is carried by the conveyance although not specially mentioned.¹

(2.) Salmon fishings, being *inter regalia*, can be acquired only by express grant from the Crown—(1) *cum salmonum piscationibus*,² or (2) *cum piscationibus tam in mare quam in aquis dulcibus*;³ or (3) *cum piscariis*, or *cum piscationibus*, with prescriptive possession by net and coble;⁴ but if that kind of possession be impossible, exercise of the right by other lawful means is sufficient; (4) the charter of a barony is a good *prescriptive title* to carry salmon fishings, although the right is not conferred by the mere erection of lands into a barony;⁵ (5) it has been held that a conveyance from a party not in right of the fishings is a good prescriptive title if it bear *with salmon fishings*.⁶(n) [The recent cases appear to confirm the statements of the answer.]

584. Does right of access to the banks of a river confer on the public the right to fish for trout?

Access to the banks of a *public* river gives any one a right to fish;⁷ but the establishment of a right of way along the banks of a *private* river does not confer on the public a right to fish, which remains with the proprietor of the lands.⁸

585. Explain the distinction betwixt positive and negative servitudes; and state the methods by which such rights are constituted and made effectual against singular successors?

(1) A *positive* servitude entitles the proprietor of the dominant tenement (*i.e.*, the property to which the servitude is accessory), to exercise certain rights and privileges over the servient tenement (*i.e.*, the property burdened with the servitude), which otherwise

¹ Bell's Prin. 747; Carmichael, M. 9646; Macdonald, 14th Dec. 1836, 15 S. 259.

² Stair, 2, 3, 69; Ersk. 2, 6, 15.

³ Forbes, M. 14250.

⁴ Ersk. *supra*; Bell's Prin. 1112.

⁵ Ersk. 2, 6, 18; Bell's Prin. 754.

⁶ Brown, M. 10844.

⁷ Bell's Prin. 747.

⁸ Ferguson, 18th July, 1844, 6 D. 1363.

(n) A Crown grant of lands on the banks of a loch, "with the salmon fishings in the wester end of" the loch "effeiring thereto," may be set up as a title to salmon fishings *ex adverso* of lands belonging to other proprietors, either by proof that the words of the grant are so comprehensive as to include such fishings, or by proof of exercise of salmon fishing for the prescriptive period; Fraser, 16th March, 1866, 4 M.P. 596.

might have been prevented. (2) A *negative* servitude controls the proprietor of the servient tenement in the free use of his property. (3) A positive servitude may be constituted in the charter of the dominant, or of the servient tenement, or in a separate deed; or by prescription, followed by possession, without any grant or other written title. When constituted by grant it will be effectual against singular successors, either if it be transferred to the record, or if followed by possession. (5) A negative servitude can be constituted only by grant; which may be in the form of a separate deed, or by insertion in the titles of either the dominant or servient tenement. Such a servitude is effectual against singular successors, although not transferred to the record.¹ [See remarks by Lord Deas in Cowan, 10 M'P. 740.]

586. Will a reservation of "mines and minerals" embrace everything of that kind; and what relative reservations ought the charter to contain?

A reservation of mines and minerals will not embrace building stone,² nor will a reservation of stone and coal include ironstone.³ Power ought to be reserved to search for, work, win, and carry away the minerals; to erect engines and machinery for that purpose; and to make roads, with power to take from the surface materials therefor; and there ought to be an obligation to indemnify the vassal for surface damages, as the amount should be ascertained by arbitration. Where the minerals are reserved, however, the superior is liable, without express stipulation, for surface damages occasioned to the vassal in the exercise of the right.⁴(p) [See, for example of a clause reserving minerals under which

¹ Ersk. 2, 9, 1; Bell's Prin. 982, 991 *et seq.* D. of Hamilton, 29th June, 1841, 3 D. 1121.

² Menzies, 10th June, 1818, F.C.; aff. 17th July, 1822, 1 Sh. App. 225; ³ Forth and Clyde Navig. Co., 21st Nov. 1848, 11 D. 122.

⁴ D. of Argyll, M. 6573.

(p) In Duke of Argyll, cited, the reservation was of "all coals and coal heughs, with liberty to work the same in any part of the lands, except houses," &c. The object of the action was to have it declared that the Duke and his tacksman were entitled to work the coals without paying surface damages. The Court by their first judgment found accordingly, but by a subsequent one sustained the defences. It appears from the report that the Duke and his tacksman had been in the habit of paying damages, and it is observed by the

superior was found not liable in damages ; Buchanan, 11 M'P., H. of L., 13.]

587. Explain the nature and effect of a clause of pre-emption.

(1) The clause of pre-emption is a stipulation that the vassal shall not have power to sell the feu, without having first made an offer of it to the superior at the price proposed by another, and it is considered a lawful and effectual condition, notwithstanding the Act of 20 Geo. II. c. 50, which annuls clauses in charters prohibiting alienations without the superior's consent.¹(r) (2) The

¹ Ersk. 2, 5, 28 ; Bell's Prin. 865 ; Menzies Lect. 574 (600) ; Campbell, 28th May, 1823, 2 S. 341.

reporter, "yet, as the bench was divided on the general point, it is by no means clear that the circumstance of usage had not an influence on the determination." In a subsequent case, a party who had agreed to take a feu of ground, under reservation of the minerals, which was a condition in all the superior's feus, insisted that "he was entitled to receive a feu-disposition which should not invert his common law right as proprietor of the surface, to insist upon the owner of the under ground strata supporting the buildings on the surface, or his paying damages in event of his failure to support them." But the Court found "that the defender is not entitled to compel the pursuer to insert in the feu-disposition a special clause of obligation in regard to the working of the reserved minerals and the liability for damages, but that the disposition should be in the same terms as the other feu-rights granted by the pursuer in the immediate neighbourhood where the working of minerals is reserved ; but in respect that the pleas of " parties "at common law might be injuriously affected by the exclusion of the proposed clause, after its insertion has been demanded," found "specially that the same is without prejudice to the defender's said pleas at common law, and under reservation thereof, and of the pursuer's answers thereto ; Steuart, 17th July, 1857, 19 D. 1071. A party who had granted a lease of minerals with power to char and calcine, which power was exercised, subsequently feued a portion of the lands for erection of a dwelling-house under reservation of minerals. The feuar having brought an action of damages against the mineral lessees and lessor, in consequence of the former charring and calcining heaps of ironstone at or near to the pursuer's dwelling-house ; held that the feuar's right to sue was not excluded by the reservation in his charter, nor by the terms of the mineral lease anterior to his feu-right ; M'Callum, 15th Mar. 1861, 23 D. 729.

(r) The condition in question is in this and the following answers treated of on the assumption of its validity, but in Tailors of Aberdeen (H. of L., 3rd Aug. 1840, 1 Rob. App. 296) the opinion of all the judges in Court of Session was given "that the validity of a clause of pre-emption still remains matter of doubt ;" and though the question has been since raised, it does not seem to have been decided. See Lumsden, 5th Feb. 1843, and Strathallan, 4th July, 1843, 5 D. 501 and 1318.

stipulation will be effectual against singular successors, as long as the title continues personal; because disponees founding upon the personal title must adopt all its conditions.¹ (3) It will qualify the feudal right, and be binding on singular successors, without a clause of irritancy, provided it enter the record.² (4) Where the clause has not been transferred to the record it will not affect singular successors.³ (5) In the case cited *infra* it was doubted whether the clause was effectual against every successive vassal throughout all time, or merely affected the grantee, his heirs and assignees, until infeftment was once taken on the charter.⁴(s)

588. A vassal, whose charter contained a clause of pre-emption, with a relative irritant clause against deeds granted in contravention, sold the feu by auction, with the superior's consent; the purchaser, without being infeft, sold to another party at a higher price, having made no offer to the superior; Can the superior reduce the sale?

The superior cannot reduce the sale; because the purchaser had never become vassal, against whom alone the prohibition is directed.⁵(t)

589. What is the effect as against a singular successor, of a condition in the charter, (1) that the vassal should not be at liberty to alienate the feu, without the consent of the superior; or (2) that, before selling it, he should offer it to the superior at a fixed price; or (3) that he should offer it at the price proposed by the intending purchaser?

¹ Bell's Prin. 864; Preston, 6th Mar. 1805; 3 Ross, L.C. 289.

³ Gall, M. 10306; Bell's Prin. 864.

² Preston, *supra*; Tailors of Aberdeen, 3rd Aug. 1840, 1 Rob. App. 318.

⁴ E. of Mar, 28th Nov. 1838, 1 D.

116.

⁵ E. of Mar, *supra*.

(s) The ground of the doubt here referred to was the terms of the condition, which was directed only against the grantee, his heirs and assignees; but if it were directed in proper terms against the grantee and all subsequent acquirers of the feu, whether by succession or conveyance, it would, if otherwise legal, be effectual.

(t) See note (s), *supra*.

(1.) A prohibition to sell the feu without the superior's consent is null; being directly struck at by the Act 20 Geo. II. c. 50.¹

(2.) A stipulation that the vassal, before selling, should offer it to the superior at a fixed price is likewise ineffectual; as being substantially a prohibition to alienate without the superior's consent.²

(3.) A stipulation that the vassal, before selling, should offer the feu to the superior at the price proposed by a third party, is legitimate and effectual.³ [See note *r*, page 280.]

590. Explain the nature and intention of the clause prohibiting subinfeudation; and its effect with regard to rights granted in contravention.

The intention of the clause prohibiting subinfeudation, directed against alienations to be held base of the seller, is to preserve the superior's composition for the entry of singular successors, and also to enable him to enforce any stipulation in his favour contained in the original charter. It is a lawful stipulation, and effectual against singular successors if transferred to the record. The effect of such a clause is—(1) that although a sub-feu by the vassal will be effectual, while his right subsists, the superior cannot be compelled to give an entry on the vassal's death, and is entitled to proceed with an action of declarator of non-entry.⁴ (2) Where the prohibition is fenced with an irritancy, the sub-feu may be challenged by the superior even before the lands fall into non-entry, at least to the effect of claiming payment of a composition.⁵(*u*) (3) A conveyance with an alternative holding, by which a temporary base right is constituted, is challengeable "by reduction, if the superior could show an interest (which it would be difficult for him to do) to proceed in that manner;"⁶ and where the pro-

¹ Ersk. 2, 5, 28.

⁴ Bell's Com. i. 28.

² Farquharson, 2nd Dec. 1800, M.

⁵ Bell's Com. *ib*.

App. "Clause," No. 3.

⁶ Tailors of Aberdeen, *supra*.

³ See Authorities in Ans. 586.

(*u*) This would probably depend on there being a stipulation in the feu-right for payment of a composition on each change of proprietorship, as otherwise the superior could not claim one while he had an entered vassal alive; and it will be observed that this remedy, though applicable to an alternative holding, is not so to a proper sub-feu, which cannot be made to hold of the original superior except by destroying the mid-superiority.

hibition is fenced with an irritancy, it is thought that he may proceed by declarator for forfeiting and resolving the right, or at least that he may insist for payment of a composition. (4) The granting of heritable securities, with the usual power to sell, is not a contravention of the prohibition.¹ [A prohibition against subinfeudation cannot be inserted in a feu-right dated after 1st October, 1874, Conveyancing Act, § 22.]

591. Is it necessary that the conditions of the feu, in all cases, be declared real?

(1.) Where the condition is of the nature of a specific obligation, which may be performed and so extinguished by one act, such as the payment of a sum of money, the presumption is, that the granter of the feu-right meant to impose it on the grantee and his heirs exclusively, and not to extend it against singular successors; and it will not be effectual against the latter, unless it is of definite amount, and declared to be a real burden on the lands, and transferred to the record.²

(2.) But where the condition is of a continuous nature, and is connected with the *naturalia* of the right, it will be effectual against singular successors as an essential condition of the feu, if clearly intended to affect them, and transferred to the record, although not declared to be real.³ (v)

¹ Bell's Prin. 866; Darroch, 14th June, 1855, 17 D. 935.

² Tailors of Aberdeen, *supra*; Clark, 20th June, 1850, 12 D. 1047.

³ Duff's Feud. Conv. 194; Menzies Lect. 576 (601).

(v) In Clark, cited, a vassal was by feu-contract bound to maintain and uphold and to keep insured a mill, &c. Held (H. of L., 8th Aug. 1854, 17 D. 27) that this obligation, implying *tractum futuri temporis*, was binding on disponee; and on a construction of its import that the mill having been burned down, he was bound to rebuild it. Observed—Such obligations must be construed according to plain meaning of language used. In the Court of Session the vassal had been found liable not to rebuild, but only to expend a certain sum received by insurance in repairing it. The discussion in this case was a good deal as to the import of the obligation and on specialties, and it may be doubted whether the distinction deduced from it in this answer is to be relied on. There is no question that effectually to constitute a sum a burden on a subject the amount must be specified; and in the opinions of the judges of the Court of Session, given under the remit by the House of Lords in Tailors of Aberdeen (cited), one point considered was whether a condition, resolving into an indefinite and fluctuating annual payment, could be effectually constituted

592. How are conditions and provisions in a charter connected with the *naturalia* of the feu made binding on singular successors ; and is it essential that such conditions and provisions be declared to attach to singular successors, or be fenced with an irritancy ?

(1.) Words must be used in the charter which clearly express that the subject itself is to be affected, and not merely the grantee and his heirs and successors ; and those words must be transferred to the record, and repeated or referred to in the subsequent investitures.

(2.) It is not necessary that any *voces signatæ* be employed, nor that such conditions and provisions be declared to attach to singular successors, or be fenced with an irritancy.

(3.) The conditions must not be useless, or vexatious, or contrary to public policy, and the superior must have an interest to enforce them.¹

593. Is a condition in the charter, that the infestments in favour of the vassal shall be expedite by the superior's agent, effectual against singular successors when fenced with an irritancy ?

It has been held by a majority of the judges in one case, that

¹ Tailors of Aberdeen, *supra*, p. 281, note 2 ; 3 Ross L. C. 269.

a real burden ; but there seems to be nothing in those opinions to warrant the idea that any condition can be made effectual against singular successors except by being made a real burden, if, indeed, this would not be the result of following the course suggested in the second branch of the answer. In the Tailors of Aberdeen, Lords Gillies, Mackenzie, Corehouse, and Jeffrey stated it to be (p. 315) "undoubted law that if a condition in a feudal grant is conceived in terms to make it real, and is not objectionable on any other ground, no irritant clause is necessary to give it effect against singular successors ;" but they suggested no other way of making conditions effectual ; and, again, in answer to the question (p. 326), "If any one of the obligations is such as to be a real burden without being so declared, is the irritancy necessary to make it binding upon singular successors ?" their Lordships said— "If an obligation in a feu or burgage right is real, it binds singular successors ; if it does not bind them, it is not real, but personal. An irritancy is often a convenient mode of enforcing a real burden, but not necessary to constitute it, except" in strict tailzies. The only safe course, where it is intended that conditions shall affect the subjects and singular successors, is to declare them real burdens.

such a condition is effectual,¹ but the decision has been strongly impugned in a later case in the House of Lords.² If the condition be invalid, the adjection of an irritancy will not make it binding. [By section 22 of the Conveyancing Act 1874, all such conditions and relative irritant clauses are declared null and void.]

594. What is the object of a clause of irritancy annexed to a condition in a conveyance?

The object of a clause of irritancy is to afford a stringent means of enforcing the condition, by giving an active title to challenge and reduce deeds granted in contravention; (y) but such a clause is not necessary to make the condition effectual, nor will it render an illegal condition operative.³

595. By what methods might insertion of the conditions in the Register of Sasines be secured before the passing of the Titles Act; and what means may now be employed for that purpose?

(1.) Before the Titles Act, insertion of the conditions in the record was secured by annexing to them an irritant and resolute clause, declaring that the conditions shall be inserted in the instrument of sasine and in the future deeds and writs of transmission; that the deeds and writs in which the conditions are not inserted shall be null; that the granter of any deed in contravention of the conditions, or in which they are not inserted, shall forfeit his right to the feu; and that the irritant and resolute clause shall be inserted as well as the conditions. The transcription of the conditions into the record might also be insured by

¹ Campbell, 28th March, 1823, 2 S. 341, and 4th March, 1828, 6 S. 679.(x)

² Tailors of Aberdeen, *supra*.
³ *Ib.*

(x) The report here cited is not the judgment referred to in the answer which was of date 23d May, 1823, 2 S. 341 (N.E. 299). The case was then appealed, and remitted by the House of Lords for the opinions of the whole judges, which, except as after-mentioned, were given; but the case was abandoned. The opinions will be found, 6 S. 679; six were in favour of, and four against, the condition. The judges of the First Division did not give any opinion under the remit.

(y) One great use of the irritancy is, that while under the simple real burden the superior can only proceed against the vassal personally for implement of the condition, under the irritancy he may evict the subject.

inserting the conditions in the precept of sasine, which behoved to be exactly transcribed into the instrument.

(2.) The Titles Act affords an effectual means of securing the full transcription of the conditions into the record by inserting in the charter a clause of direction, in terms of section 3, directing the part containing the conditions to be recorded. (z) [The provisions of the Titles Act are substantially re-enacted in the Consolidation Act, 1868, § 12.]

596. Where the superior is desirous to ascertain what rights have been granted by himself or his predecessors affecting the superiority, by what form of action may the production of such rights be enforced?

The ancient method was by an action of shewing the holding against the vassal; but the modern form of action is reduction-improbation,¹ or exhibition.²

597. Is the superior entitled to challenge encroachments on the *dominium utile* where the vassal does not interfere?

Yes; the superior being entitled, in virtue of his infeftment in the *dominium directum*, to insist in any action necessary for the preservation of the feu.³ (b)

598. What is the purpose of the clause of *tenendas*; and what did it anciently contain?

The purpose of the clause of *tenendas* is to point out the superior of whom the lands are to be holden, and to express the particular kind of tenure. Anciently it contained a long enumeration of accessory rights and privileges, and also the destination, or the series of heirs in whose favour the grant was made.⁴

¹ Ersk. 2, 5, 3.

² Rose, M. 3971.(a)

³ Breadalbane, 12th Feb. 1851, 13 D. 647.

⁴ Ersk. 2, 3, 24.

(z) The course here suggested would not be attended with any advantage, as without such a clause the *whole* deed must be recorded. See also 23 & 24 Vict. c. 143, § 3.

(a) This case was at the instance, not of a superior, but of the Crown's donatory to the revenues of certain chaplainries.

(b) As a consequence of this principle, though a right of servitude by grant is not effectual against the superior without his consent, one acquired by prescription is so, as he is entitled to interrupt it; Ersk. 2, 9, 4,

599. Where the charter does not express the kind of holding, what tenure would be presumed?

The presumption formerly was for ward-holding; but now the tenure would be presumed to be feu; or blench, if held of the Crown.¹(c)

600. Is a feuar of part of a barony, the *tenendas* of whose charter expressed "all mosses and marshes," entitled to participate in a moss belonging to the barony, but which was not a part or pertinent of the lands conveyed to the feuar by the dispositive clause of the grant?

No; because the *tenendas* is ineffectual to convey any right not expressed in the dispositive clause, or not transmitted by it as part and pertinent.²(d)

601. What is the purpose of the clause of *reddendo*?

The clause of *reddendo* expresses the particular return to be made by the vassal to the superior of services, or of feu or blench duty; and also the relief payable on the entry of an heir, and, when taxed, the composition to be paid on the entry of a singular successor.

[602. State shortly the provisions of the Conveyancing Act, 1874, as to casualties in feus granted after 1st October, 1874.

It is not lawful to stipulate for any casualty on the succession of an heir, or the acquisition of a singular successor, or in any way except at fixed intervals. But it is lawful to stipulate for a permanent increase or reduction of feu-duty, or for payment of a casualty in the form of a periodical fixed sum or quantity, provided that the amount thereof and the time or times of payment shall both be certain. In the absence of express agreement there are to be no casualties, § 23.]

¹ Ross Lect. ii. 164.

² Ersk. 2, 3, 24.

(c) Duff (Feud. Conv. p. 49) says, "This" (blench) "tenure will now in *dubio* be presumed, at least in lands held of the Crown."

(d) Where the dispositive clause of a feu-contract gave an unlimited right to the lands, but at the end of the *tenendas* there was a clause reserving to the superior right to "win coals and coal heughs;" held that it was an effectual reservation of right to the coals; Bain, 19th May, 1865, 3 M'P. 821.

603. What is the extent of a sub-feuar's liability for feu-duty to the mediate or over-superior ?

The sub-feuar is liable to the over-superior for the full *cumulo* feu-duty, unless his immediate superior's charter confers power to divide and apportion it among the sub-feuars.¹(e)

604. Where the *reddendo* provides for the casualty of relief in these terms :—"Doubling the said feu-duty the first year of the entry of each heir ;" Is the superior entitled to a duplication of the feu-duty as relief, in addition to the feu-duty for the year ?

No ; the superior is entitled only to a sum equal to one year's feu-duty in addition to the feu-duty for the year current at the heir's entry.² But where the expression is "a duplicand of the said feu-duty, over and above the feu-duty of the year," the heir is liable for two years' feu-duty besides that of the year.(f)

605. Are blench-duties and payments in kind, as kain-fowls, recoverable, if not demanded within the year ?

Blench-duties, if payable *si petantur tantum*, or of a subject of yearly growth, will be lost if not demanded within the year.³ But payments in kind are recoverable although not demanded within the year.⁴ [Hope, 10 M'P., 347.]

606. Is a superior entitled to claim interest on arrears of feu-duty ?

Interest is not due on feu-duties *ex lege* ; and unless the charter contain a stipulation for interest, it can be claimed only from the date of a summons against the vassal to enforce payment.⁵

607. Where a feu is constituted by a unilateral deed signed only by the superior, or by a bilateral deed signed by both parties ; May the vassal refute the feu ?

¹ Bell's Prin. 697 ; Duff's Feud. Conv. 80.

² Ersk. 2, 5, 49.

³ Ersk. 2, 4, 7.

⁴ Duff's Feud. Conv. 83. See Nasmyth, M. 10276.

⁵ Tweeddale, 2nd March, 1842, 4 D. 862.

(e) This applies more properly to *sales* of the subject in parcels than to sub-feus.

(f) So found, Earl of Zetland, 30th June, 1841, 3 D. 1124.

The vassal cannot refute the feu, whether it be constituted by a unilateral or a bilateral deed, the right of refutation *invito domino*, being competent only to such vassals as held proper *beneficia*, but not to vassals in feu-holdings, in which there is a mutual onerous contract.¹

608. Does a vassal continue personally liable for the feu-duty after a sale of the feu; and what is the effect of a separate bond for the feu-duty by the vassal to the superior?

(1) The vassal continues personally liable for the feu-duty after a sale until the purchaser is entered with the superior.^{2(g)} [This liability remains, notwithstanding the entry implied by the purchaser's infestment, until notice of change of ownership is given. Section 4, sub-section 2, of the Conveyancing Act, 1874, and relative schedule.] (2) Where the vassal has granted a separate bond for the feu-duty the obligation upon him and his heirs is perpetual, and cannot be got rid of by a transference of the subjects.^{3(h)}

609. What is the extent of a purchaser's liability to the superior on obtaining an entry where the provision in the reddendo is in these terms:—"Doubling the said feu-duty the first year of the entry of each heir and successor?"

The purchaser is liable in a full composition of a year's rent under deduction of feu-duty and public burdens, the terms quoted not being sufficiently express to tax the entry of *singular* successors.⁴⁽ⁱ⁾ [Magistrates of Inverkeithing, 2 R. 48.]

¹ Hunter, 16th Dec. 1834, 13 S. 526; Elmsley, 26th March, 1855, H. of L., 2 Macq. App. 40.

² Wallace, M. 4195.

⁴ M'Lachlan, 14th May, 1823, 2

³ King's College, Aberdeen, 11th Aug. 1854; H. of L., 1 Macq. App. S. 303.

(g) This question again rose in a recent case, and the same judgment was given. The whole judges were consulted, and the opinions were nine to four; Hyalop, 13th March, 1863, 1 M'P. 535.

(h) The same result would probably follow if the personal obligation on the vassal, "his heirs, executors, and successors whomsoever," was contained in a feu-contract. It was so held as to a contract of ground-annual; Miller, 3rd Feb. 1849, 11 D. 495; as reversed on appeal, 17th March, 1853, 1 M'Q. 345.

(i) As a general rule, the word "assignees" in a charter applies only to

610. May the superior renounce or discharge the casualties of superiority, or the feu-duties ?

(1.) The superior may renounce or discharge the casualties, as these are only natural, but not essential, to the feu. They may be renounced by express words in the dispositive clause of the charter, or by a deed of renunciation, or by charter of *novodamus*, the renunciation being transferred to the record.

(2.) The feu-duty cannot be wholly renounced, as it is an essential character of fees that the vassal acknowledge the superiority by some payment or lawful service. But the feu-duty may be restricted to a mere elusory payment by a deed of renunciation and restriction; or it may be vested in the vassal as a separate *blench* fee, by conveyance from the superior.¹(j)

611. Where the charter contains a renunciation of the casualties, Is it effectual against singular successors in the superiority, if not transferred to the record ?

In one case it was held that such a renunciation was effectual against the singular successors of the superior although not transferred to the record; but the ground of the decision seems to be that the party having accepted of the conveyance of the superiority under the express burden of the feu, he was bound by every clause in the feu-right. The general question appears to be still open, but it will turn on this, whether the renunciation is personal, or forms a real condition of the feu.²

¹ Ersk. 2, 3, 11; Duff's Feud. Conv. 79; Nasmyth, M. 5723.

² Nasmyth, M. 5723;(k) and Kilkerran's Report, M. 10276, in which

assignees before infeftment, but as it is flexible it may be so used as to displace the usual presumption and to mean singular successors, whether acquiring before or after infeftment; so under a *reddendo* which stipulated for "the double of the said feu-duty the first year of the entry of each heir, and the sum of £12 Scots the first year of the entry of the assignees of the said Isobel Spreull or her foresaid to the haill lands," a singular successor was found entitled to an entry for that composition; Hamilton, 16th July, 1853, 15 D. 925.

(j) The correct mode, on feudal principle, would be for the vassal to resign the feu and get it back by charter of resignation and *novodamus* containing the new *reddendo* specifying the feu-duty, and containing an obligation to enter all heirs and singular successors gratuitously.

(k) The report here referred to is also by Kilkerran, and bears that "The Court being much divided upon the general question, they, with a

612. Where the entry of vassals is taxed in the charter, Is the taxation effectual against the heirs and singular successors of the superior?

The taxation will be effectual as between the superior and the vassal, and their heirs; but it is doubtful whether it will bind singular successors of the superior, if not entered on the record.¹(l)

the reporter adds:—"This nevertheless in effect implied a decision of the general question, at least as to the import of the obligation. For if the obligation upon Robert Hamilton (the original superior) to enter the heirs of the vassal, &c., were only binding upon the granter and his heirs, they made no part of the feudal right, with the burden whereof only the conveyance to the pursuer (the purchaser of the superiority) was

granted; and for the same reason the import of the exception from the clause of absolute warrandice also depended on the intention of these obligations; for if it was no other than that they should be binding upon Robert Hamilton himself, and his heirs, they did not fall under the warrandice contained in a conveyance to singular successors."

¹ Duff's Feud. Conv. 86. See Nasmyth, *supra*.

declared intention to avoid a decision of it, took up the case upon the specialty" mentioned in the answer. As in dispositions of superiority, the feu-rights are always excepted from the warrandice, and as superiors can in their grants or feu-rights deal with and modify the casualties as they please, the ground of decision in Nasmyth seems quiet sufficient for the general case. In regard to the question of personal or real, referred to in the answer, it is to be observed that, according to former practice, the *reddendo* was not inserted in the sasine, and did not enter the record, but still the feu-duty formed a real burden affecting the vassal and his singular successors; and the same principle would seem to apply to the superior and his singular successors in regard to the casualties.

(l) In the passage from Duff here referred to, an opinion is expressed that the taxation is not effectual "in a question with the singular successor of the superior unless expressed in the dispositive clause;" in support of which Nasmyth (*supra*, note 2, p. 290) is quoted. For the reason already stated (note (k), p. 290), it is thought that that view is incorrect, and reference may be made to Dixon, 3rd March, 1858, 20 D. 721, where it was assumed by all the judges "to be both competent and usual to insert a clause taxing the entry of heirs and singular successors." The mode there proposed was the usual one, of inserting the composition in the *reddendo*, "And paying as composition on the entry of every heir and singular successor to the foresaid subjects one penny, and no more, to which the composition is hereby taxed;" and though it does not appear that the clause was formally approved of by the Court, no objection was stated to it by any of the judges. The casualties might, as suggested by Mr. Duff, be referred to, as the feu-duty is in the dispositive clause; but this would not, under the old practice, have met

613. By what means may the superior be secured in payment of a composition on each sale of the feu ?

By inserting in the dispositive clause of the charter a prohibition against subinfeudation, fenced with a clause of irritancy ; a provision that all disponees of the grantee should be obliged to enter within a certain period from the dates of the dispositions in their favour ; a provision that a composition should be due on each sale to a purchaser, without reference to the death of the vassal ;^(m) and (if the charter is to contain a precept of sasine) a declaration that the charter should not form a valid warrant for sasine after a certain time. If the title is to be completed by registration, a clause of direction may be used to insure the insertion of the provisions in the record.¹(n) [But see Answer 602.]

[614. What are the provisions of the Conveyancing Act, 1874, as to redemption of casualties in feus granted before 1st October, 1874 ?

(1.) They may be redeemed on such terms as are agreed on between the superior and vassal.

(2.) Failing agreement, such casualties (except when fixed in amount and time of payment in money or fungibles) may be redeemed by the vassal—(a.) when exigible on death only, on paying the amount of the highest casualty with fifty per cent. added ; (b.) when exigible on sale or transfer, as well as death, on payment of two and a-half times the amount of the casualty. For further details, reference is made to § 15. See also Morris, 4 R. 515, Edin. Roperie Co., 6 R., H. of L. 1.]

¹ Duff's Feud. Conv. 85.

the objection that they did not enter the record. The better way might be, as he proposes (p. 209), to except the feu-rights themselves in the dispositive clause of the conveyance of the superiority (as seems to be his meaning) ; but it does not appear how the vassal is to secure this.

(m) Or that a composition should be payable by each assignee or disponee at the first term after his acquiring right to the feu.

(n) A clause of direction would not be appropriate, because it only appoints certain parts of the deed to be recorded, while without such clause the whole deed must be so, which insures the object in view. The charter should in the dispositive clause exclude assignees before infeftment or registration in Register of Sasines, and declare that the charter shall not be a valid warrant for such infeftment, nor shall be so registered after a certain time, and there should be

[615. What options has the superior in regard to such redemption money ?

He can elect that it shall be converted into an additional feu-duty equal to four per cent. upon the capital ; otherwise he must take payment, and grant a discharge at the vassal's expense ; §§ 16 and 17, and Schedules F and G.]

616. What is the import of the statutory clause, "I assign the writs ;" and how is the clause usually expressed in the original charter ?

(1) The statutory clause imports an absolute assignation to the writs and evidents, and to all the open precepts therein contained, to which the disponent has right.¹ [Consolidation Act, § 8.] (2) In the assignation of writs in the original charter there is usually a qualification that the writs are assigned, to the effect only of maintaining and defending the disponent's right, and an obligation to make them forthcoming, (o) conform to inventory, on all necessary occasions, on a receipt and obligation for re-delivery of them within a reasonable time, and under a suitable penalty.

617. What is the import of the statutory clause, "I assign the rents" ?

The clause of assignation to rents, unless specially qualified, imports assignation to the rents to become due for the possession following the term of entry, according to the legal and not the conventional terms, unless in the case of fore-hand rents, in which case it imports an assignation to the rents payable at the conventional terms subsequent to the date of the entry. (p) [Consolidation Act, § 8 ; see as to forehand rents, Maxwell, 1 R. 122.]

618. What is the use of the clause of assignation to rents ?

It is to give the disponent a title, before infeftment, to recover the rents and duties payable by the tenants and occupiers of the lands.²

a provision that all charters, writs, and precepts in favour of heirs and singular successors shall contain the same conditions.

¹ 10 & 11 Vict. c. 48, § 8.

² Menzies Lect. 536 (557).

(o) At the vassal's expense.

(p) 10 & 11 Vict. c. 48, § 8. See as to construction of clause, Murray's Trs., 31st May, 1865, 3 M'P. 845.

619. In a competition for the rents betwixt a disponee with a personal title, which had been intimated to the tenants, and an heritable creditor, who had attached the estate, Who will be preferred ?

The disponee will be preferred to the rents which fell due before the completion of the creditor's real right, but the latter will carry off the rents falling due subsequently.¹

620. What is the import of the statutory clause of obligation to relieve of all feu-duties, casualties, and public burdens ?

It imports an obligation to relieve of all feu-duties or other duties and services, or casualties payable to the superior, and of all public, parochial, and local burdens due from or on account of the lands prior to the date of entry.²(*r*) [Consol. Act, § 8.—Notwithstanding the implied entry under the Conveyancing Act, a proprietor selling with a disposition containing the above clause is liable (a composition having fallen due by the death of the last-entered vassal before the date of the disposition) to relieve the disponee of the composition ; Straiton Estate Co., 8 R. 299.]

621. A superior bound himself in 1789 to relieve the vassal of all minister's stipend and public burdens imposed and to be imposed on the lands ; and public burdens were imposed by a statute passed(*s*) in 1812 ; Was the vassal entitled to relief thereof ?

No ; because the parties are not held to have had in view burdens imposed under statutes not existing at the date of the charter.³(*t*) [See in confirmation Dunbar's Trustees, 5 R., H. of L., 221.]

¹ Duff's Feud. Conv. 93. See Ans. 827.

² Scott, 25th June, 1850, 12 D. 1077.

³ 10 & 11 Vict. c. 48, § 3.

(*r*) The statutory clause is appropriate to dispositions, not to original charters in which the terms should be different.

(*s*) Insert, "in 1839, and an assessment voluntarily imposed by the heritors."

(*t*) Obligation to relieve a vassal "of all cesses, taxations, supply, highway money, and other public burdens whatever, due and payable forth, or that any-

622. Is the superior liable for an assessment for building or repairing the parish minister's manse? State the reason.

The superior is not liable for such assessment; because he is not an heritor in the sense of the Act 1663, c. 21.¹

623. What is the import of the statutory clause, "I grant warrandice"?

Absolute warrandice as regards the lands and writs, and warrandice from fact and deed as regards the rents.² [Consolidation Act, § 8.]

624. How ought the clause of warrandice to be expressed when the lands are under lease, but the tenants are partly not yet in possession?

An exception should be made in the clause of warrandice of the current leases, and with regard to those under which the ten-

¹ Dundas, M. 8511.

² 10 & 11 Vict. c. 48, § 8.

wise may be imposed upon the lands in all time coming," held to entitle him to be relieved of poor rates; Reid, 16th Feb. 1843, 5 D. 644. See also Lees, 11th Nov. 1857, 20 D. 6; Hunter, 16th July, 1858, 20 D. 1311; Paterson, 10th Dec. 1863, 2 M'P. 234; and Campbell's Trs., 17th Nov. 1865, 4 M'P. 50, where the question was as to poor rates imposed under 8 & 9 Vict. c. 43, which was passed after the date of the feus. In Campbell's Trs. it was also held that under an obligation to relieve the vassal "of all minister's stipends" and "teind duties" payable for and forth of the lands, "bygone and in all time coming," he was entitled to be relieved of subsequent augmentations of stipend; though, as there observed *per* Lord Deas, an obligation of relief "of stipend imposed or to be imposed does not necessarily, or even usually, import relief from augmentations;" but it appeared that the superior had been all along in the habit of paying the whole stipend. In Rosalyn (Locality of Dysart), 7th Dec. 1865, M'P. 140, it was held that an obligation to relieve the vassal "of all public burdens, except poor rates and prison tax, which have been or shall be laid or assessed" on the lands, did not include stipend, that being a burden, not on the lands, but on the teinds, which were not conveyed. See Clayhills, 21st Dec. 1864, 3 M'P. 269, where an obligation to relieve of public burdens contained in a feu-contract, which was never feudalised, but was superseded by another, which narrated at length the first deed and obligation of relief, but did not in the part containing the new grant repeat that obligation, was held to be lost.

ants have not yet obtained possession it should be specially declared that the disponee accepts the lands under burden of such leases, and that he shall allow the tenants to obtain entry; but without prejudice to the disponee to impugn the leases upon any ground in law which shall not infer recourse against the granter.

625. May a charter by a subject-superior be recorded for preservation in the Sheriff Court Books, if it contains a consent to registration in that record?

No; charters by subject-superiors being registrable for preservation only in the Books of Council and Session.¹

626. What was the import of the precept of sasine in use before the Infefment Act of 1845?

The precept of sasine was a desire and request by the superior to his bailies, whose names were left blank, to proceed to the ground of the lands, and there give and deliver to the disponee, or his heirs and assignees, heritable state and sasine, real, actual, and corporal possession of the lands conveyed, by deliverance to them, or to their attorney, bearers of the charter, of earth and stone of the ground of the lands, and all other symbols usual and necessary.²

627. What were the changes on the precept of sasine introduced by the Infefment Act of 1845?

(1.) No bailie is named, the notary being directed to give infefment.

(2.) There is no direction to proceed to the lands, that ceremony being abolished by the Act.

(3.) There is no delivery of symbols.

(4.) There is no reference to the grantee's attorney.

[This Act is not (except the 6th section) repealed by the Consolidation Act, 1868. See Schedule A, No. 2.]

628. Do precepts of sasine fall by the death of the granter or grantee?

Precepts of sasine, being mandates, formerly expired on the

¹ 1693, c. 35.

² Jur. St. i. 17 (4th edit.)

death of either party; but by the Statute 1693, c. 35, it was enacted that precepts should be sufficient warrants for sasine after the death of either party, or both, provided that sasines taken after the death of either party express the title of those in whose favour infestment is expedite, and that the title be deduced in the instrument, under the pain of nullity. The Act excepts precepts of *clare constat*, which, as being strictly personal, formerly fell on the death of either the granter or grantee, but now only on the death of the grantee.¹ [Consolidation Act, § 103.]

629. Enumerate the symbols of infestment under the old form?

- (1.) Earth and stone for lands and houses.
- (2.) Hasp and staple for burgage tenements.
- (3.) Clap and happer for mills.
- (4.) Net and coble for fishings.
- (5.) Sheaf of corn, or handful of grass and corn, for teinds.
- (6.) A psalm-book and the keys of the church for patronage.
- (7.) A penny money for annualrent, or, if prestable in victual, a handful of corn, and earth and stone for the lands.
- (8.) An oar and water for a right of ferry.
- (9.) The Book of the Court for jurisdiction.²

III. INSTRUMENT OF SASINE.

630. Define sasine, and what is its effect?

Sasine is the delivery of possession to the vassal (formerly by symbols, afterwards by notarial act), attested by a notarial instrument; and its effect, when completed by registration, is fully to divest the superior of the *dominium utile*, and to invest the vassal—to convert the personal right, or *jus ad rem* acquired by the vassal by delivery of the charter, into a *jus in re*, or a right in the subject.

631. When was the instrument of sasine introduced into Scotland?

¹ 10 & 11 Vict. c. 48, § 15.

² Ersk. 2, 3, 36.

It is stated by Sir Thomas Craig that the instrument of sasine was introduced by James I., in 1430, after his return from England; but there is evidence that it was used at an earlier period.¹

632. Describe the ceremony of infeftment under the old form.

The superior's bailie, the vassal's attorney, a notary, and two witnesses, having gone to the lands, the attorney delivered the deed containing the precept to the bailie, requiring him to perform the duties, in terms of the precept. The bailie delivered the deed to the notary, who explained the nature of the conveyance(*x*) to the witnesses, and read the precept. The notary having then re-delivered the charter to the bailie, the latter delivered the proper symbols of possession to the attorney, who thereupon took instruments in the hands of the notary, by giving him a piece of money; the whole *res gestæ* being done in the presence of the witnesses, and afterwards set forth in the instrument of sasine.

633. Enumerate the clauses of the instrument of sasine in the old style.

(1) The invocation; (2) the date, and the year(*y*) of the sovereign's reign; (3) the appearance of the parties(*z*) and the notary and witnesses, on the ground; (4) the narrative of the charter; (5) the requisition to the bailie; (6) the bailie's acceptance of the warrant, and delivery of it to the notary; (7) the publication of the charter, and the transcript of the precept; (8) the delivery of sasine; (9) the taking of instruments; (10) the summary of the *res gestæ*,(*a*) and the names and designations of the witnesses; (11) the notary's docquet.²

634. Must the year, both of the era and of the sovereign's reign, be inserted in the instrument in the old form?

¹ Ersk. 2, 3, 34.

² Jur. St. i. 59 (4th edit.)

(*x*) Strictly the deed required to be "read and published," and the instrument always bore that it had been so.

(*y*) "Both of the Christian era and"—

(*z*) Or of their representatives, the procurator and bailie.

(*a*) With the hour of the day when it took place.

It is doubtful whether both are essential ; but where both are given, they must correspond.¹(b)

635. A sasine in the old form was dated the day of May, 1840, another was dated the day of July, 1840, and both were recorded on 10th August, that year ; Were both, or either, good or bad ?

(1) The first sasine is null ; because sasines were inept which were not registered within sixty days of their date ; and here, although infestment had been expedite on the last day of May, the registration was not made in due time. (2) The second sasine might be sustained, if not challenged on the ground of deathbed,(c) bankruptcy, or the like ; because infestment taken on any of the days of July is timeously registered on the 10th of August.²(d)

636. The bailie was described in the instrument as “ Brown in Dubbs,” his Christian name being left blank ; Is an objection on that ground relevant, there being no averment that there was another person of the same name in the same place ? State the reason.

No ; because, as stated by the Lord Chancellor in the case cited, there being no reason to suppose that there were more than

¹ Town of Brechin, 11th Dec. 1840,
3 D. 216 ; Lindsay, 27th Feb. 1844,
6 D. 771 ; M'Farlan, 2nd June, 1853,
15 D. 708.

² Dickson's Trs., 15th Dec. 1820 ;
Hume 925.

(b) In Smith, 13th Feb. 1835, 13 S. 461, a sasine was found null, the year of the Christian era being written partly on an erasure, though the year of the king's reign was also given, was not subject to any objection, and corresponded with the other. In this case, Lord Moncreiff, in his opinion, stated—“ It is essential to the validity of every instrument of seisin that it should bear the date both of the Christian era and of the king's reign.” In M'Farlan, cited, note 1, the Court held that the year of the king's reign, which was the only one inserted, not being correctly specified, the sasine was null, and that it was not necessary to decide the question, “ whether it is essential to the validity of such an instrument that its date be described by reference to the year both of the Christian era and of the sovereign's reign.”

(c) A question of deathbed could hardly arise as to a sasine.

(d) In Gordon, 5 Br. Sup. 587, a sasine was sustained, the date at the beginning of which was first October, 1771, while at the end sasine was said to have been given on 30th September.

one "Brown in Dubbs," the objection resolves into a latent ambiguity, which must be averred and proved.¹

637. Is a sasine valid in which the precept is not inserted, or only partially inserted?

(1) In an old case, a sasine was sustained in which the precept was not inserted;² but the decision is of doubtful authority. (2) The insertion of the precept in sasines in the new form is indispensable.³ (3) Where the precept contains a description of the lands, and infeftment is to be given only of part, it has been held sufficient to insert only as much of the precept as relates to the portion of the lands in which sasine is to be given.⁴

638. A sasine bore that "heritable state and sasine, real, actual and corporal possession," had been given by delivery of the usual symbols, but without specifying them; (2) another omitted the words "heritable state and sasine," &c., but contained a specification of the proper symbols; (3) and a third bore that "heritable state," &c., had been given, but mentioned a wrong symbol; Were the instruments, or any of them, valid?

The first has been held to be valid;⁵ but the second⁶ and third are null.^{7(f)}

639. The precept directed heritable state and sasine to be given without specifying the symbols, but these were

¹ Morton, 10th Dec. 1828, 7 S. 172; aff. 26th Nov. 1830, 4 W. & S. 379.

² Lady Lamberton, M. 14309.

³ 8 & 9 Vict. c. 35, § 5.(e)

⁴ Don, 4th Feb. 1813, F.C.

⁵ Urquhart, M. 9915-21, aff.

⁶ Davidson, 14th Nov. 1827, 6 S. 8.

⁷ Carnegie, M. 14316; Town of Brechin, 11th Dec. 1840, 3 D. 216.

(e) And Schedule (B), annexed.

(f) In Town of Brechin, cited, there was not a wrong symbol, but an omission of one, the instrument bearing only "stone," in place of "earth and stone," and the year of the king's reign did not correspond with that of the Christian era; but it was observed, that either objection would have been fatal. In a prior case, Gordon, 5 Br. Sup. 587, a sasine which did not bear that both earth and stone were delivered was sustained.

correctly set forth in the sasine ; Was the infeftment valid ? State the reason.

Yes ; because the precept being an act of a private party, all that is required is, that it contain sufficient authority to warrant the infeftment. The instrument, on the other hand, being an *actus legitimus*, must be complete in itself, and the strictest observance of form is essentially necessary.¹

640. The dispositive clause of the charter was in favour of A, and the precept was to B ; What is the effect of infeftment on the charter ?

Infeftment will not vest the fee in B, as there was no act of transmission to him, the dispositive clause being the ruling clause of the deed ; nor can A directly complete a real right under the charter, as it does not contain a precept in his favour.²

641. Is a precept to infeft the "heirs of A" a sufficient warrant for sasine ?

A sasine in favour of "the heirs of A" is null ; but if the party infeft is named in the instrument, and his character as heir established by a service deduced in the instrument, the sasine is valid.³

642. What is the effect of infeftment on a precept in favour of "Robert Murdoch & Co.," or to "Robert Murdoch and the other partners of Robert Murdoch and Company" ?

(1) Infeftment to "Robert Murdoch & Co." is null ; because a company cannot sustain the feudal relation.⁴ (2) Infeftment to "Robert Murdoch and the other partners of Robert Murdoch and Company" is a valid investiture to the partner named, but not to the others.⁵(g)

¹ Barstow, 18th Feb. 1858, 20 D. 612.

² Shanks, M. 4295.

³ Bell's Prin. 876.

⁴ Morrison, 18th June, 1818 ; Hume 720.

⁵ Denniston, 16th Feb. 1808, M. App. "Tack," No. 15.

(g) In Denniston, cited, it was held that a *lease* may be granted to a company *socio nomine*.

643. May infeftment in all lands belonging to the granter be validly given on a general conveyance containing a precept?

(1) Infeftment on a general conveyance of all lands belonging to the granter is null; because the lands in which infeftment is to be given must be distinguished and identified in the instrument.¹ (2) But the sasine is good if the granter's infeftments have been produced to the notary, and mentioned in the instrument.²

644. May infeftment in liferent, or in trust, or in security, or in an annualrent, be given on a precept authorising sasine in fee; or *vice versa*?

(1) A precept of sasine in fee may be assigned so as to warrant infeftment in liferent, or in trust, or in security;³ but a precept in fee has been held not to authorise infeftment in an annualrent.⁴(h) (2) A precept for sasine in liferent, or in trust, or in security, is no authority for infeftment in fee;⁵ but a precept for sasine in trust in a settlement containing a power of sale may be assigned by the trustees to a purchaser so as to warrant sasine in fee, free of the provisions and conditions of the trust.⁶(i)

¹ Belshes, 21st Jan. 1815, F.C.
(and 2 Ross L. C. 32).

² Graham's Crs., M. 49.

³ Bell's Prin. 877; Duff's Feud. 889.
Conv. 109; Menzies Lect. 540 (562).

⁴ Mitchell, M. 14335.

⁵ Authorities in note 3, *supra*.

⁶ Cockburn, 4th June, 1836, 14 S.

(h) Mitchell, cited, was decided 16th July, 1767. See *contra*, Bonthron, 29th May, 1805, Hume 238. A husband by contract of marriage bound himself to secure his wife in an annuity payable out of any lands he then had or might acquire; he afterwards disposed a house to her in security of the annuity, and assigned an open precept in his favour on which she was infeft. Held, in a question with trustees for his creditors, that her infeftment was effectual to secure her annuity.

(i) This is put more broadly than the case of Cockburn, cited, warrants. The trust-deed there conveyed to the trustees, "and to the assignees or disponees of the trustees." There was power to sell, and the purchaser was to be nowise concerned with the conditions of the trust, and the precept was for infefting the trustees "and the assignees of the trustees;" and the judgment proceeded on these specialties. No general rule, such as is stated in this answer, was settled, and each case would probably depend on its own circumstances.

645. In what cases were separate acts of infeftment necessary?

Separate acts of infeftment were necessary—(1) where the lands were discontinuous; (2) where they were held of different superiors; (3) where they were held by different tenures; (4) where they were held by different titles.

646. If an instrument of sasine, in several portions of land locally discontinuous, and held by different titles, bore—(1) that sasine was given “on the ground of the said lands,” without the words “respectively and successively;” or (2) that sasine was given “on the ground of the said lands respectively and successively, where the same are discontinuous;” would both, or either, of the sasines be valid?

(1) In the first case, it is thought, the sasine would be valid, for although the words “respectively and successively” be wanting, the expression used is not exclusive of the fact that separate acts of infeftment were taken;¹(*k*) (2) but in the second case, it is thought the sasine would be bad as to the parcels of land held by titles different from those of the parcel on which infeftment had actually been taken, unless the word “discontinuous” would bear the interpretation of *legal disjunction*, as well as local discontinuity.²

647. By what means, and to what extent, might the necessity for separate acts of infeftment be obviated before the Infeftment Act?

Where the lands had been erected into a barony, or had been united by a clause of union in a charter from the Crown, infeftment might be given in subjects lying locally discontinuous or requiring different symbols, at the place appointed; or, if no place were named, or any part of the barony or united lands, and by the symbols of earth or stone. But a clause of union obviated only discontinuity and the necessity for different symbols, and

¹ Ersk. 2, 3, 45; Bell's Prin. 872.

² See Duff's Feud. Conv. 112.

(*k*) It was so held in Gordon, 5 Br. Sup. 587. In Maxwell, M. 14818, the expression was “*super fundis dictarum terrarum*,” &c., and not *super fundo*.

had no effect in dispensing with separate sasine, where the superiors, tenures, or titles of the several lands were different.¹

648. Where different portions of lands contained in a charter with a clause of union had been sold or feued ; Were separate acts of infeftment in these portions necessary ?

No ; the union being an inherent quality of the lands, which is not dissolved by a separation of a part from the whole, neither the part alienated, nor the part retained, being deprived of the benefit.²

649. What words have been held indispensable in the notary's docquet ?

The words "*vidi scivi et audivi*" have been held indispensable ;³ and a sasine was reduced from the docquet of which these words were omitted, "*dum sic ut præmittitur, dicerentur agerentur et fierent una cum prænominatis testibus presens personaliter interfui.*"⁴(*l*)

650. Is it necessary that the witnesses sign each page of the instrument ?

The subscription of each page(*m*) by the witnesses was necessary in infeftments in the old form, because they were called to witness and attest the facts ; but it is unnecessary in the case of sasines in the new form, because the witnesses attest merely the subscription of the notary.

¹ Ersk. 2, 3, 45 ; Bell's Prin. 874.

² Primrose, M. 14326.

³ Bell's Prin. 874 ; Montgomery, 2nd March, 1813, F.C. ; Heron, M. 8684.

⁴ Macintosh, 17th Nov. 1825, 4 S. 190.

(*l*) In the case of Macintosh, cited, reference was made to Maxwell, M. 16837, and observed, that it should not be followed. There a sasine with the short attestation, "*Ita esse attestor signo et subscriptione his meis manualibus,*" was sustained.

(*m*) The Act 1686, c. 17, requires the subscription only of each *leaf* by the notary and witnesses, and a sasine so signed by the notary was sustained. It does not appear from the report how the witnesses had signed ; Carnegie, 26th Feb. 1796, M. 8858. The practice was as stated in the answer.

651. What is the effect of erasures in sasines ?

Erasures in sasines do not affect their validity, unless there be proof of fraud, or the record is not conformable to the instrument. But the statute conferring the protection does not extend to sasines *propriis manibus*.¹(*p*) [Consolidation Act, 1868, § 144.]

652. Is it a relevant objection to a sasine that at the time of taking infestment the testing clause of the disposition was not filled up ? State the reason.

No ; because the delivery of the deed, containing the precept to the grantee, was a warrant to him to insert the testing clause, and when filled up it is *probatio probata* of the fact of the deed being completed by subscription at its date.²

653. What changes were introduced in the form of giving infestment by the Infestment Act of 1845 ?

(1) The ceremony of infestment on the lands and the symbols were abolished ; and it was provided that sasine should be effectually given, and infestment obtained by producing the warrant to a notary public, and expeding and recording an instrument of sasine, in terms of the Act. (2) One act of infestment is declared to be effectual, whether the lands lie contiguous or discontiguous, or are held by the same or different titles, or of one or more superiors.³

654. Enumerate the clauses of the instrument of sasine in the new form.

(1) The production (*r*) of the charter to the notary by or on behalf of the grantee ; (2) the narrative of the dispositive clause of

¹ 6 & 7 Will. IV. c. 33, § 1.(*p*)

² 8 & 9 Vict. c. 35, § 1.

³ Leith Bank, 22nd Jan. 1836, 14 S. 332.

(*p*) The provisions of the 6 & 7 Will. IV. c. 33, are now extended to notarial instruments, and instruments of resignation *ad remanentiam*, instruments of cognition, and other notarial instruments in burgage subjects, and to all notarial instruments expedite under the 8 & 9 Vict. c. 31 ; Titles to Land Act, 1858, § 33 ; and Titles to Land Act, 1860, § 19, which also corrects the error in § 33 of the Act of 1858.

(*r*) At a place specified.

the charter; (3) the insertion of the precept; (4) the giving of sasine; and (5) the testing clause.

655. State generally the leading provisions of the Statute 1617, c. 16, establishing the Register of Sasines, and of the subsequent relative Statutes.

(1.) 1617, c. 16, established the General Register of Sasines in Edinburgh, and Particular Registers in each of the districts into which the kingdom is thereby divided; and ordained that all sasines, reversions, &c., should be recorded either in the General Register or in the Particular Register of the district within which the lands are situated, within sixty days of their date. The keeper of each register is appointed to record the deeds within forty-eight hours after presentation, and to engross the whole of the body of the writ in the register. Sasines not thus registered, it is declared, shall make no faith in judgment in prejudice of a third party who has acquired "a perfect and lawful right" to the lands; but that the unregistered writs may be used against the granter, his heirs and successors.

(2.) 1672, c. 16, appointed the keepers of the registers to make minute-books containing the names and designations of the parties, and the common designation of the lordship or barony of the lands mentioned in the writ.

(3.) 1681, c. 11, established the Burgh Registers of Sasines.

(4.) 1686, c. 19, enacted that when sasines were presented to the keepers, and delivered back with a certificate of registration, that should be sufficient for the parties' security, although the writs were not engrossed in the register.

(5.) 1693, c. 13, enacted that all infeftments or other real rights shall, in all competitions, be preferable and preferred according to the date and priority of registration.(s)

(s) Two sasines were presented for registration on the same day and by the same agent, and were both stated in the minute-book to be given in between the same hours, but the one first in date was first entered in the minute-book and first recorded. Held incompetent to prove by parole that they were *de facto* presented together; Douglas, 21st Feb. 1835, 13 S. 505. Where it is intended that two bonds are to rank *pari passu*, a declaration to that effect should be inserted in each of them. In the old forms, this was done in the dispositive clause and precept, so as to insure its entering the record; it should now be at the end of the dispositive clause.

(6.) 1693, c. 14, provides that the minute-book (*t*) shall express the day and hour when, and the names and designations of the persons by whom, the writs shall be presented; and that each minute shall be immediately signed by the presenter of the writ and the keeper; and that the writs shall be registered in the order of the minute-book.

(7.) 1696, c. 18, repealed the Act of 1686, and enacted that no sasine, or other writ appointed to be registered, should be of any force against others than the granters and their heirs, unless duly booked and inserted in the register.

(8.) A.S., 17th Jan. 1756, appointed the notary's docquet, as well as the body of the sasines, to be fully engrossed in the register.

656. What are the provisions of the Infektment Act of 1845 with respect to the registration of sasines on precepts by subjects.

(1) Sasines in the new form are made registrable at any time during the life of the party in whose favour the instrument is expedite; (2) it is enacted that the date of presentment and entry set forth on the instrument by the keeper of the record should be taken to be the date of the instrument of sasine and infektment; (3) in case of error or defect, it is made competent to record another instrument, having effect from the date of its registration. (*u*)

657. What were the provisions of the Titles to Land Act with respect to the registration of a conveyance, as an equivalent to infektment?

That it shall be competent and sufficient for the grantee of the conveyance, instead of expediting and recording an instrument of

(*t*) The entry in the minute-book, and not that in the record, is the evidence of the date of recording; and a discrepancy between them, which, if the record had been taken as the evidence, would have made the registration beyond the sixty days, held of no importance; MacLaine, 16th June, 1852, 14 D. 870; aff. 6th July, 1855, 18 D. 44.

(*u*) This was competent under the former system, it being held that a precept was not exhausted till a valid sasine had been taken and duly recorded; Watson, 15th May, 1818, Hume 719; Moncrieff, 29th Jan. 1830, 8 S. 416; Kibbles, 18th Dec. 1830, 9 S. 238; aff. 5 W. & S. 553.

sasine, to record the conveyance itself in the Register of Sasines ; and the conveyance being presented for registration with a warrant of registration thereon, specifying the person on whose behalf it is presented, and signed by him or his agent,^(x) and being so recorded along with such warrant, shall have the same legal force and effect as if the conveyance had been followed by an instrument of sasine duly expedite and recorded at the date of recording the conveyance, according to the former law and practice, in favour of the person in whose behalf the conveyance is presented for registration.^{1(y)}

[658. What are the leading alterations as to warrants of registration contained in the Consolidation and Land Registers Acts of 1868, and the Conveyancing Act ?

(1.) That all writings recorded in any Register of Sasines shall have a warrant of registration.

(2.) That the warrant shall specify the county or counties, or burgh or burghs.

(3.) That it may authorise registration for preservation, or for preservation and execution, as well as for publication.

(4.) A doubt was set at rest whether a warrant could be signed by a firm of agents. Consolidation Act, § 141 ; Land Registers Act, §§ 4 and 12 ; Conveyancing Act, § 33.]

659. What are the essential acts in recording a sasine or a conveyance ?

(1) The entry in the minute-book ; (2) the transcription of the

¹ 21 & 22 Vict. c. 76, § 1.

(x) The warrant must contain the designation of the person on whose behalf the deed is to be recorded, and there must be added after the agent's signature his designation and residence and character as agent of the party (see schedule to Act). A disposition was recorded with a warrant in these terms— "Register on behalf of Matthew Pettigrew. William Maclean, agent." Held in a competition that the registration was invalid and null ; Johnston, 16th June, 1865, 3 M'P. 954.

(y) In case of any error or defect in the recording of a conveyance or warrant, it may be recorded af new either with the original or a new warrant of registration ; Titles to Land Act, 1860, § 35. In the case of notarial instruments, the remedy is " of new to make and record a notarial instrument," &c.; *ibid.*

sasine into the record, and, in the case of a conveyance, the transcription also of the warrant of registration ; (3) the certificate of registration.

660. Must marginal additions in the record be signed ?

It is not essential that marginal additions in the register be signed, if they are in the same hand as the body of the record ; because the register, being in *publica custodia*, is exempt from suspicion.¹

661. Within what time must sasines or conveyances be recorded in the Register of Sasines ?

(1.) Sasines in the old form, and sasines *propriis manibus*, must be recorded within sixty days of their date.²

(2.) Sasines in the new form, and the whole writs and instruments comprehended within the term "conveyance," by the interpretation clause of the Titles Act, may be recorded at any time during the life of the grantee.³ [Consolidation Act, § 142.]

(3.) Before the Infektment Act, Chancery precepts were void, if infektment was not given before the first term of Whitsunday or Martinmas posterior to the date of the precept ; and that statute provides that such precepts shall be void unless the sasine be recorded before such first term.⁴

662. Where an error has been committed in recording a conveyance, or in the warrant of registration ; How may the defect be remedied ?

(1) Where an error has been made in recording a conveyance, the defect may be remedied by recording of new the conveyance and the original warrant. [See as to erasures in the Record Conveyancing Act, § 54.] (2) Where the error occurs in the warrant, the conveyance with a new warrant may be recorded. [Consolidation Act, § 143.]

¹ MacLaine, 16th June, 1852, 14 D. 870 ; (2) aff. 6th July, 1855, 18 D. 44.

² 1617, c. 16.

³ 8 & 9 Vict. c. 35, § 3 ; 21 & 22 Vict. c. 76, §§ 19, 36.

⁴ Duff's Feud. Conv. 482 ; 8 & 9 Vict. c. 35, § 6.

(2) The point referred to in the answer was not appealed. It does not appear from the report in whose hand the marginal addition was made, and it is to be observed that the body of the record is not authenticated by the subscription of each page.

663. What is the criterion for fixing the date of registration of a sasine or conveyance?

(1.) Before the Infestment Act, 1845, the date and fact of registration were held to depend on the entry in the minute-book.¹

(2.) By that Act it was provided that the date of presentment and entry set forth on the instrument by the keeper of the record shall be taken to be the date of the instrument of sasine and infestment.² (3.) By the Titles to Land Act it is enacted that the date of entry in the minute-book shall be held to be the date of registration.³ [Section 142 of the Consolidation Act repeats this last enactment, and provides in addition for the case of two or more writs received by post at the same time, in terms of the Land Registers Act, 1868.]

664. What is the effect of an unrecorded sasine; and by what consideration was the Court influenced in determining the question?

It has been settled that an unrecorded sasine is absolutely void, although some persons may not be entitled to plead the nullity; the *ratio* of the decision being, that great insecurity would be occasioned if a real right were held to result from an unrecorded sasine, for then the warrant, being exhausted, would be no longer effectual, and the grantee would be prevented from making his right secure against third parties by expeding and recording another sasine.^{4(b)}

665. What is sasine *propriis manibus*; and what is necessary in the attestation of such sasines?

¹ Maclaine, 16th June, 1852, 14 D. 870.

² 8 & 9 Vict. c. 35, § 3.

³ 21 & 22 Vict. c. 76, § 19.

⁴ Kibbles, 18th Dec. 1830, 9 S. 233; aff. 5 W. & S. App. 553; Young, 16th Jan. 1844, 6 D. 370.

(b) The majority of the judges in Kibbles, cited, in which case the opinion of the whole Court was taken, seem to have rested their judgment on the ground that under a sound construction of the Act 1617 such a sasine was absolutely null, one test being that the granter of the precept could have given another, which would have been effectual to a third party, and therefore that he could not be divested, [and that so long as he could give a new precept the old one must remain in force. See note (u), p. 307.]

Sasine propriis manibus, now obsolete, was when infeftment was given by the superior personally on the ground, without the intervention of a bailie, whether there was an antecedent conveyance or not. When such sasines proceeded on a separate conveyance, the attestation of the notary and witnesses was sufficient. But when there was no antecedent conveyance, the granter of the infeftment required to sign the instrument as well as the notary and witnesses; because such sasines operated as conveyances, and there cannot be an effectual conveyance without the written deed of the proprietor divesting himself, the instrument being merely the assertion of the notary.¹ It has been held, however, that the instrument bearing the granter's subscription is effectual without a testing clause.²(c) [Schedule H, No. 3, of the Consolidation Act is a form of warrant containing authority for infeftment *ex propriis manibus*.]

IV. MISSIVES OF SALE, PROGRESS OF TITLES, SEARCHES OF INCUMBRANCES, ETC.

666. What are the essentials of missives of sale?

(1) The missives must be probative; (2) they must point out the subjects and the price, or afford in themselves materials for conclusively determining the subjects and the price; and (3) they must import a finished obligation, without condition or qualification on either side.³ [A missive was written and signed by the buyer's brother; held that the missive not being holograph of the buyer, there was not a completed contract of sale; Scottish Lands and Building Co., 7 R. 756. See also Caithness Flagstone Co., 7 R. 1117, 18 S. L. R. 466.]

667. A party made an offer, by letter, for the purchase of an estate. Thereafter the seller posted an acceptance of the offer, while, on the same day, the offerer posted a retraction; and the letters, both of acceptance and

¹ Ersk. 2, 8, 38; King, M. 12523.

² Menzies Lect. 827 (879).

³ Kibbles, M. 14314.

(c) The most common instance of such sasines in modern times was in the case of provisions by husbands to their wives.

retractation, were delivered on the following day;
Was the estate sold? State the reason.

In these circumstances it was held that there was a completed sale; the grounds of the decision being, that the mere posting of a letter of recall does not make it effectual as a recall, so as from the moment of posting to prevent the completion of the contract by acceptance; that the purpose of recall being to prevent acceptance, such purpose fails if the acceptance has gone forth; that it is sufficient if the acceptance has been put into the post-office, after which it is out of the party's power; and that it is not necessary to a completed acceptance that the letter reach its destination.¹(d)

668. Where the lands were sold as "my property of A," and the minerals were not part of the seller's property, being reserved to his superior; Was the sale effectual?

No; the purchaser being entitled to resile if not apprised at the time of the purchase that the property is held under any material reservation.²(e) [See in confirmation, Whyte, 6 R. 699.]

¹ Thomson, 13th Nov. 1855, 18 D. 1.

² Robertson, 27th Nov. 1841, 4 D. 121.

(d) This point may be explained a little more fully. The principle seems to be that the recall will fail if the acceptance has gone forth "before the notice of recall has reached, or ought in ordinary course to have reached," the offeree; and that it is sufficient for a completed acceptance that the letter, properly addressed, be despatched so that in due and regular course it should reach the offerer within the time allowed, either by express stipulation or otherwise, for accepting, though, in consequence of casualties in the post-office, it should not actually reach him within that time, the offeree not being responsible for such casualties, provided it does reach the offerer *dum res sunt integrae*, by his not having, in the *bona fide* belief that his offer was declined, disposed of the property otherwise. How long (apart from any recall) an offerer would remain bound in the event of a duly posted acceptance not reaching him in course is a question, on the whole circumstances, for the determination of a jury; Thomson, *supra*, note 1; Higgins, 2nd July, 1847, 9 D. 1407; aff. 24th Feb. 1848, 6 Bell 195; Bell's Com. i. 343, 344.

(e) In the case of Robertson, cited, there was no averment by the seller that he had made the purchaser aware of the reservations; but after the record had been closed, and the cause had come by reclaiming note to the Inner House, the seller was allowed to lodge a minute "specifying what he averred and offered to prove in support of his statement, that the defender actually knew of the reservation" "and restrictions;" so that knowledge of the fact

669. What are the leading provisions of the Act 1617, c. 12, in so far as it relates to the positive prescription?

That those persons, and their heirs and successors, who have possessed their heritages for the space of forty years continually and together, following and ensuing the date of their infeftments, without lawful interruption, shall never be troubled or disquieted in the heritable right and property of their lands by the Crown, or subject-superior, or any other person pretending right by virtue of prior infeftment, or on any other ground except falsehood; provided the possessor can show a charter to himself or his predecessors, with sasine upon it, preceding the forty years; or, where there is no charter extant, instruments of sasine, one or more, standing together for the said space, proceeding either upon retours or precepts of *clare constat*. And the statute declares, that the years of minority of those against whom the prescription is pleaded shall not be counted.

[670. What are the leading provisions of the Conveyancing Act, 1874, as to the positive prescription?

(1.) That possession upon an *ex facie* valid irredeemable title, duly recorded, shall found prescription, and possession following thereon for *twenty* years continually and together and peaceably, shall, for the purposes of the Act 1617, be equivalent to possession for forty years, according to said Act.

(2.) That if such possession on such recorded title shall have continued for thirty years, no deduction shall be made on account of the years of minority of the persons against whom the prescription is pleaded, nor of the period during which such persons were under legal disability; Conveyancing Act, § 34.

(3.) There is a proviso that this enactment shall not affect the period of enjoyment necessary to establish a public right of way or other public right.]

671. What must be the prescriptive title in feudal subjects of a purchaser, heir, or adjudger?

(1.) Purchaser. A charter(*f*) and sasine, with possession for forty [now *twenty*] years from the date of infeftment(*g*) unin-

admitted or proved might perhaps bar the objection. Such reservations are not unusual in feus for building, and the fact might be so patent and notorious as to render notice unnecessary.

terrupted by minority. Sasine alone is sufficient in the case of infetment *propriis manibus*, not proceeding on a separate warrant, and an instrument of resignation and sasine *more burgi* is of itself a good prescriptive title. [See also (2) of previous answer.]

(2.) Heir. An instrument of sasine, founded on a retour or precept of *clare*, or an instrument of cognition and sasine *more burgi*, with possession for forty [now *twenty*] years, or a series of such sasines, successively following each other, or connected by the uninterrupted possession of apparent heirs. [See also (2) of previous answer.]

(3.) Adjudger. Charter of adjudication, with sasine, followed by forty years' possession after expiry of the legal.¹(h)

672. What must be the nature of the possession to found prescription?

(1.) The possession must be continuously and together for forty [now *twenty*] years following the date of the first infetment.

(2.) It need not be actual, but only civil.

(3.) It must be perfect in degree.²

673. An heir succeeded in 1830 to his father, who had been infet in 1818. The heir made up a title in 1845, and then sold the estate. In instructing a prescriptive title, are the years between 1830 and 1845 to be deducted? State the reason.

The period between 1830 and 1845, during which the heir possessed an apparency, is not to be deducted; because his possession is accounted a continuance of that of his ancestor.³

674. By what methods may the positive prescription be interrupted, and what is the effect of the interruptions?

¹ Ersk. 8, 7, 5; Bell's Prin. 2010
et seq.

² Duff's Feud. Conv. 178.

³ Caithceon, M. 10810.

(f) It will be kept in view that not only charters, but dispositions, procuratories, precepts, and every deed of alienation serving as a warrant for sasine, are sufficient to ground prescriptive character.

(g) If the party, though himself a singular successor, has a progress connected with heirs, it is not necessary to produce charter and sasine dated more than forty years back; it is enough if he produce sasine or consecutive sasines in favour of heirs with whom he is connected together with conveyance to himself; Stair, 2, 11, 20.

(h) See Johnston, M. 10789, and Robertson, 10th May, 1815, Dow's App. 3, 108.

Positive prescription may be interrupted—(1) *via facti* ; (2) by notarial protest ;(i) and (3) by judicial process. Interruptions *via facti*, or by notarial protest, are effectual against the possessor of the ground only, and not against singular successors, unless an instrument shall be extended and duly registered within sixty days. Interruption by citation, in order to have effect against singular successors, must be recorded within sixty days,(k) and lasts only for seven years, unless followed by an action which prolongs its effect for forty years.¹(l)

675. What registers ought to be searched in making a search of incumbrances, with a view to a sale of the property ?

(1.) The General Register of Sasines, and the Particular Register of the district in which the lands lie, for forty years ; or, if the subjects were held in burgage tenure, the Burgh Register of Sasines for the same period. [The alteration in the positive prescription does not affect the period of this search.]

(2.) The General and Particular Register of Inhibitions for forty years, against all the parties who have successively been proprietors of the lands during the prescriptive period.

(3.) The Register of Adjudications for forty years. [The periods, for which searches for inhibitions are now asked, are various ; some still ask a forty years' search, others accept a search for five years against all the proprietors for forty years. The search for adjudications is now generally made against the proprietors back to the infetment founding the prescriptive progress.]

Sometimes a search is also made in the Register of Entails ; and if it is suspected that adjudications may have been recently used, a search ought to be made in the Signet Books.

[As to the subsisting registers for publication, see Ans. 217.]

¹ Bell's Prin. 2007.

(i) Erskine (3, 7, 40) classes interruption by protestation and *via facti* as the same.

(k) These registrations are required by 1696, c. 19, and the renewals by 1669, c. 10.

(l) Provided it be prosecuted to comparance and judicial acts ; Wilson, M. 11330. This case is also reported, M. 10974, where it appears that in the action pleaded on there had been "a debate and an interlocutor," which, though the interlocutor was one finding "No process," was held sufficient.

676. What burdens or incumbrances may not be disclosed by a search for forty years ?

(1.) Heritable bonds, or other securities constituted before the commencement of the prescriptive period ; which may have been kept up by payment of interest.

(2.) Adjudications before the prescriptive period, followed by possession.

(3.) Real burdens may be constituted by the titles of the property, without being noticed in the search.

(4.) Restraint on alienation produced by litigiosity, either by action or diligence.¹

(5.) Deathbed, which is a ground of reduction attaching to the property, and available against a purchaser.² [Reduction *ex capite lecti* is abolished as regards persons dying after 16th August, 1871.]

(6.) Objections, on the ground of forgery, or force and fear, which are pleadable against an onerous disponee.

(7.) Claims of ancestor's creditors under the Statute 1661, c. 24, which enacts that no right or disposition made by an apparent heir, to the prejudice of the ancestor's creditors, shall be valid, unless made a full year after the defunct's death, an enactment which affects the heir's onerous deeds.³

(8.) Servitudes, whether positive or negative, may be constituted without infeftment.

(9.) Tacks do not necessarily enter the register.

(10.) Terce, which is measured by the husband's sasine, but the widow's right does not enter the record.

(11.) Courtesy, constituted by law.⁴

(12.) Succession duty, payable out of the estate of a deceased proprietor, attaches preferably to the lands.(n)

¹ Ersk. 2, 12, 41 ; 2, 11, 7 ; Duff's Feud. Conv. 183.

² Ersk. 3, 8, 97 ; Bell's Prin. 1786.

³ Maga. of Ayr, M. 3135 ; Taylor, M. 3128.(m)

⁴ Duff's Feud. Conv. 185.

(m) See also Christie, 17th May, 1839, 1 D. 745.

(n) This is under the 16 & 17 Vict. c. 51, § 42. It is provided (§ 52) that "every receipt and certificate purporting to be in discharge of the whole duty" "shall exonerate a *bona fide* purchaser," notwithstanding any suppression or mis-statement in the account," and that no *bona fide* purchaser, "under a title not appearing to confer a succession, shall be subject to any duty with which such property may be chargeable," "of which he shall not have had notice."

(13.) Securities for repairs on subjects in burghs constituted by jedge warrants of the Dean of Guild.^{1(o)}

677. What is the effect of a stipulation in articles of roup, that the purchaser shall be satisfied with the title as it stands?

(1) Such a stipulation is effectual and binding on the purchaser where the *title is feudally defective* only, as the matter resolves into a question of expense. (2) But it is not binding where the title is radically bad, the substantial right to the property being wanting; because the mere exposure of a property for sale implies a guarantee that the exposor has the *right*.²

678. A purchaser, who was taken bound to relieve the seller of the sum in an heritable security over the property, having been sequestrated; Is the creditor in the security entitled to rank on his estate? State the reason.

No; because the purchaser's obligation was not such as to make him personally liable to the holder of the security.³

[679. What alteration on the law as to purchaser's obligation to heritable creditors was made by the Conveyancing Act, 1874?

(1.) That when an agreement to that effect appears *in gremio* of the conveyance, an heritable security with its personal obligations shall transmit against the purchaser, § 47.

(2.) Schedule K provides the means of making the personal obligations effectual against the purchaser.]

680. Where the lands purchased are liable in real warrandice of other lands, is the purchaser entitled to insist for a discharge of that burden?

Yes; unless the title to the principal lands is amply secured by prescription.⁴

¹ Ersk. 3, 1, 34.

319; Menzies Lect. 831 (883).

² Anderson, 4th Dec. 1818, F.C.; Carruthers, 26th May, 1826, 4 S. 34; Sorley's Trs., 14th Feb. 1832, 10 S.

³ Kippen, 24th Feb. 1852, 14 D. 533.

⁴ Durham's Trs., M. 16641.

(o) Also minorities that may fall to be deducted from periods of prescription.

681. Where the missives contain a stipulation that the price is to remain a real burden on the property, but the seller dies before the purchaser's title was made real; Whether is the price heritable or moveable?

The price is heritable *destinations*; the matter depending on intention, which in this case is sufficiently expressed by the stipulation in the missives that the price was to remain a real burden.¹ [By the Consolidation Act, 1868, as explained by the Conveyancing Act, 1874, § 30, real burdens are now moveable as to succession.]

682. May the purchaser reject a title, originally limited or defective, on which prescription has run; or if the seller absolutely warrants the subject?

(1.) The purchaser may reject a defective title, although prescription has run on it; because the course of prescription may have been interrupted.

(2.) It is not a good answer that the seller absolutely warrants the subject; because warrandice is merely personal.²

683. Was a seller bound to enter with the superior before disposing to a purchaser?

(1.) Where the seller was infeft on a disposition, with an alternative holding from his own author, who was alive and entered, the purchaser could not insist on the seller's entry, because he might complete a public title, if he chose, at an expense not greater than if the seller were entered.(p)

¹ Mead, 27th June, 1828, 6 S. 1084.

² Nairne, M. 14169; Durham's Trs., M. 16641.

(p) So far as the expense of entry is concerned, the purchaser would probably not be affected one way or other whether the seller was or was not entered. The reason rather seems to be because the purchaser cannot be called on to enter, and he is secured by his alternative holding; but some conveyancers are of opinion that even where the seller is infeft, as stated, and the fee is full, but not in his person, then, if there be a prohibition of subinfeudation, he is bound to enter to protect the title from challenge. This might, so far as the superior is concerned, depend on whether or not he was entitled to demand an entry from each purchaser, because otherwise he would have no interest, and might therefore have no right to enforce the prohibition. See Tailors of Aberdeen, 18 S. 226; 2 S. & M'L. 609; 1 Rob. 296.

(2.) But if the subjects were in non-entry by the death of the last-entered vassal, the seller must enter with the superior prior to granting the disposition; because the purchaser was not obliged to accept of a title which would force him immediately to enter as a singular successor.¹ [See Straiton Estate Co., 8 R. 299, as to incidence of a casualty in the present state of the law.]

V. DISPOSITION.(r)

684. What is meant by public and base infeftments?

Infeftments granted by vassals holding immediately of the Crown were originally called *public*; and those which flowed from their vassals were termed *base*, as being of a lower description, and further removed from the Crown. By a *public* infeftment is now meant an infeftment *a me*, to be held of the disponent's superior; and a base or subaltern infeftment is *de me*, one holding of the disponent himself.

685. What is the effect of a completed conveyance *de me*, and of a completed conveyance *a me*?

(1.) The conveyance *de me* creates a sub-vassalage, the disponent being vassal to the disponent, while the latter, continuing to hold of his superior, is divested only of the *dominium utile*.

(2.) The conveyance *a me*, when completed, produces a change of vassals, the disponent being substituted in the place of the disponent, who is entirely divested.²

686. Explain the operation of the disposition with a holding *a me vel de me*.

It enabled the disponent, by taking infeftment on the conveyance, or recording it in the Register of Sasines, at once to complete a base right or perfect feudal title to the *dominium utile*, held in blench of the granter in virtue of the *de me* holding, and convertible at any time by the superior's confirmation, in virtue of the *a me* holding, into a holding of him, so as to substitute the disponent exactly in the place of the disponent.³

¹ Gardiner, M. 15037.

² Ersk. 2, 7, 16.

³ Menzies Lect. 606 (636).

(r) Some questions relating to Dispositions will be found in branch II. of this Part, "Original Charter."

687. What led to the cessation of subaltern rights in England?

The statute of Edward I., *Quia emptores terrarum* (1290), prohibited the creation of subordinate feus of a rank inferior to those held immediately of Crown vassals; and the provisions of the statute were extended by subsequent Acts to the immediate vassals of the Crown.¹

688. Was subinfeudation anciently prohibited in Scotland?

In early times subinfeudation was permitted, as this form of conveyance was not regarded as an alienation. It is said that subinfeudation was prohibited by an Act passed in the reign of Robert I., containing provisions similar to those of the English statute *Quia emptores terrarum*, but the former statute, if ever it was in observance, fell soon into disuse.²

689. Enumerate the leading statutory relaxations of the feudal rule against alienation of the feu.

(1.) 1469, c. 36, enabling creditors-apprisers to obtain an entry from the debtor's superior on paying a year's mail, as the lands are set for the time.

(2.) 1672, c. 19, extending the same power of obtaining an entry to adjudgers.

(3.) 1681, c. 17, and 1690, c. 20, entitling purchasers of bankrupt estates at judicial sales to an entry on the same terms as adjudgers.

(4.) 1685, c. 22 (Entail Act), enabling proprietors to entail their lands, and substitute heirs, uncontrolled by the superior.

(5.) 20 Geo. II. c. 50, enabling heirs and singular successors holding a procuratory of resignation to compel the superior to give an entry by charter of resignation, on payment of the fees and casualties.

(6.) 10 & 11 Vict. c. 48 (Lands Transference Act), § 6, enabling heirs and disponees to enforce an entry by charter of confirmation.(s)

¹ Menzies Lect. 583 (609).

² Ersk. 2, 7, 8.

(s) Professor More says, in reference to this enactment—"This is a very important provision, because it enables a party, where subinfeudation is pro-

(7.) 21 & 22 Vict. c. 76 (Titles to Land Act), §§ 7 and 9, by which superiors are bound to grant writs of confirmation (*t*) and resignation.

[(8.) Conveyancing Act, 1874, § 22, by which it was made incompetent in future feus to prohibit subinfeudation or conveyances with an alternative holding.]

690. How did a purchaser complete his title before the Act 1469, c. 36?

Before the Act 1469, a purchaser took two charters from the seller, one *a me* and the other *de me*. On the latter he immediately took infeftment, and then brought an action of mails and duties against the tenants, which was equivalent to possession, thus securing himself in the property, while the former charter *a me* afforded the means for an entry with the superior, when his consent was obtained.¹

691. By what means did purchasers compel an entry with the superior after the Act 1469, c. 36?

Where the superior refused to receive the purchaser, the seller granted to the latter a bond for a sum exceeding the value of the lands, upon which he led an apprising, and, in the character of a creditor, the purchaser compelled the superior, in virtue of the statute, to give him an entry as a vassal-appriser.²

692. What was the criterion of preference of base rights before the system of registration was established; and what is now the criterion?

Before the establishment of the registers for publication, the criterion of preference of base rights was their date; but as they might be kept secret, and facilities were thus afforded for fraudu-

¹ Duff's Feud. Conv. 144.

² Ersk. 2, 7, 6.

hibited, to grant an effectual disposition containing the alternative holding, which, being operative against all parties except the superior, he himself may now be compelled to confirm the right when required to do so;” Lect. i. 493: but it may be doubted whether this view is well founded, because, though the terms of the enactment are very broad, there is a *proviso* that every superior, when charged to give such entry, may in a suspension “show cause why he ought not to be compelled” to do so, and it might be a sufficient cause that the infringement of the prohibition of subinfeudation was injurious to his interests.

(*t*) “Provided always that the party requiring such confirmation shall be entitled to demand an entry by confirmation.” See note (*s*), *supra*.

lent preferences, it was enacted by the Act 1540, c. 105, that whoever purchased lands on an onerous title, and obtained peaceable possession, should be preferred to those who claimed under a private or base right, though it should bear a prior date. This statute remained in force after the Act 1617, establishing the Register of Sasines, until the passing of the statute 1693, c. 13, by which it was enacted that all sasines should be preferable according to the priority of their registration, "without respect to the distinction of base and public infeftments, or of being clad with possession or not clad with possession."¹

693. What led to the disuse of the two charters *a me* and *de me*; and what disadvantage resulted from completing a purchaser's title on separate charters?

The increased facility of transmission, arising from the Act 1469, by which superiors were compelled to enter creditors, combined with the confidence produced by the progress of the system of registration, gradually led to the disuse of the two charters.² A disadvantage resulting from the completion of a purchaser's title on separate charters was, that a base fee was thereby created, and the subaltern right could be extinguished and consolidated with the superiority only by resignation *ad remanentiam*, whereas that result does not follow when the disponee's title is properly completed under a conveyance with an alternative holding.

694. Enumerate the clauses of the modern disposition.

(1) The narrative; (2) the dispositive clause; (3) the term of entry [where no term of entry is specified, the first term of Whitsunday or Martinmas after the last date of the disposition is implied; Conveyancing Act, § 28]; (4) clause of tenendas [now unnecessary], instead of an obligation to infeft, the latter clause being now unnecessary; (5) clause of resignation [now unnecessary]; (6) assignation of writs; (7) assignation of rents; (8) clause of relief of feu-duties and public burdens; (9) clause of warrandice; (10) clause of registration; (11) precept of sasine, now unnecessary; (12) testing clause.(x)

(See Questions on the Clauses of the Original Charter.)

¹ Ersk. 2, 7, 10 *et seq*; Menzies Lect. 606 (635).

² Menzies Lect. 609 (638).

(x) Some recent cases of competing rights under dispositions may be here noticed.

695. Is it necessary that the words "and my whole right, title, and interest, present and future therein," be added to the description of the lands?

I. ONEROUS AND GRATUITOUS DISPOSITIONS.

1. The proprietor of a burgage tenement disposed one storey of it to a purchaser in 1792, and in 1793 disposed the whole gratuitously, without excepting that storey, to his wife, who in 1794 was infeft. The purchaser and his heirs possessed on a personal title till 1837, when the then heir was infeft. In 1842 a singular successor of the wife acquired the whole property, and in 1862 a purchaser from him, who had acquired right and been infeft in 1853, brought an action against the heirs of the purchaser of the storey, concluding for—(1) declarator of the pursuer's right to the whole house; (2) reduction of the defender's title; and (3) their removal from the storey. Held—(1) that neither party had a title by prescription, the pursuers from want of possession, the defenders from not having been infeft for forty years; and (2) that the defenders' title was preferable as in right of an onerous disponee, while the original disposition by the common author to his wife was gratuitous. Observed that, the record disclosing two infeftments in the storey, it was the duty of the purchaser (1) to examine the warrants on which the sasines proceeded, and (2) to inquire which had been followed by possession; *Anderson*, 13th Nov. 1868, 2 M'P. 100.

2. A and B, as "heirs-portioners and *pro indiviso* proprietors" of subjects, disposed them for a price to B, "whom failing, to her children equally, with all right, title, and interest which A and B, "as heirs-portioners and joint proprietors *pro indiviso*," had in the subjects. A and B were truly not heirs-portioners, A having right to two-thirds, as representing her father and an aunt; and B to one-third, as representing her mother, their sister, and neither had made up a valid title. B's eldest son and heir subsequently got from A a gratuitous disposition in his own favour of her share of the subjects, and after B's death made up a title to her share by passing her by and serving himself heir to his grandmother, and he also served A heir to her father and aunt. Held that the other children of B had, under the disposition by A and B to her, a sufficient title to sue a reduction of the gratuitous disposition subsequently obtained by B's heir. Observed, *per* Lord Justice-Clerk Inglis, that under a conveyance "with all right, title," &c., "the disponee is entitled to the benefit of every right to the lands belonging to or vested in the disponent, in whatever character that right may belong to him. The disponee is entitled to have his right fortified by all which the granter can do, no matter whether in the character set forth *descriptivè* in the deed, or under some other title in his person, whether personal or feudal;" *Gilmour or Dunlop*, 14th Jan. 1864, 2 M'P. 412.

II. INEFFECTUAL DISPOSITION FOLLOWED BY POSSESSION, *Falsa Demonstratio*.

A, who was proprietor of a piece of ground with houses thereon, on the eve of entering into a second marriage, executed a disposition in favour of B, the only child of his former marriage, which bore to be granted "in name of tocher

These words are not essential, but their absence might, in certain circumstances, occasion difficulty, as where the seller holds the property and superiority split, and upon different titles; it being doubtful whether, in that state of the seller's title, a disposition wanting the words adverted to would transmit both fees. (y)

696. Where the seller's title is burdened with conditions and provisions which are appointed to be inserted *verbatim* in the subsequent deeds of transmission, under the pain of nullity; Is full insertion of the conditions and provisions necessary?

[The insertion of the conditions and provisions in the disposition is unnecessary, it being sufficient to refer to them as set forth at full length in any recorded deed, instrument, or writing applicable to such lands, or to the estate of which such lands form

or bairn's part of gear." The deed was intended to convey part of the said ground and houses, but it contained no feudal clauses, and assigned an unexecuted precept which had no relation to the subjects conveyed or intended to be conveyed. It contained a clause of warrandice and an obligation that "I have not granted nor shall not grant nor subscribe any writs or deed to the hurt or prejudice hereof," and infetment and possession followed. A thereafter executed a disposition in favour of C and D, the children of his second marriage, which embraced the subjects possessed by B under the conveyance in her favour. After the lapse of nearly eighty years the representatives of C and D brought an action against the representative of B to have it found and declared that they had right to the subjects which had been so possessed by B and her representative. Held that the pursuers, as representatives of A, were personally bound to do whatever was necessary to complete the title of the defender, who was accordingly assoilzied from the conclusions of the action; Burke, 27th March, 1865, 3 M'P. 799.

(y) The clause of "all right, title," &c., or, in the new form, "my whole right," &c., has very important effects (see Ersk. 2, 7, 2, and 3, and observations of judges in Love, 6th Nov. 1863, and Anderson, 13th Nov. 1863, and Gilmour, 14th Jan. 1864, 2 M'P. 22, 100, and 412, and Burke, 27th March, 1865, 3 M'P. 799, *supra*, note (x), p. 322), but not the one here supposed. Where the two fees have been split, as stated in this answer, they become, and, until consolidated, remain, separate rights or estates, requiring separate conveyances, unless the effect shall be worked off by possession and exercise of all the rights of ownership during the period of prescription on a progress of titles *ex facie* sufficient to carry both fees, though really only of the superiority; Bald, M. 15084; Bruce, M. 10805; Walker, 27th Feb. 1827, 5 S. 469; Wilson, 29th Nov. 1839, 2 D. 159.

part. Schedule H of the Conveyancing Act, 1874, is a form in which reference may be made. The Act also provides that a proprietor may sign and record a writing containing general conditions of feuing, and that such conditions may be effectually imported by reference into the feu-rights in whole or in part, § 32. This answer is altered from that in the last edition.]

697. What is the statutory import of the obligation to infest *a me vel de me*?

It imports "an obligation on the disponer to infest the disponent, and his heirs and successors, upon their own expenses, by two several infestments and manners of holding, one thereof to be holden of the disponer, and his heirs and successors, in free blench, for payment of a penny Scots, in name of blench farm, at Whitsunday yearly, upon the ground of the lands, if asked only, and freeing and relieving him and them of all feu-duties and other duties and services exigible out of the said lands and others, by their immediate lawful superiors thereof; and the other of the said infestments to be holden from the granter, and his foresaids, of and under their said immediate lawful superiors, in the same manner as the granter, or his predecessors or authors, held, hold, or might have holden the same, and that either by resignation or confirmation, or both, the one without prejudice of the other."¹ [See section 6 of the Consolidation Act.]

698. What is the import of an obligation by the disponer to infest the disponent "by two infestments, and manners of holding, and that either by resignation or confirmation?"

It imports an obligation to infest *a me* only, as it refers solely to the modes of completing a public right.²

699. What would be the effect of omitting the words *a me* from the holding of the conveyance?

If the words *a me* were omitted from the holding, and *de me* alone expressed, infestment on the conveyance would create a base fee, holding permanently of the disponer, and incapable of being converted into a public right by confirmation.

¹ 10 & 11 Vict. c. 48, § 2.

² Peebles, 9th Dec. 1825, 4 S. 290.

700. Where no holding is expressed in the conveyance, what kind of holding is implied?

[An *a me vel de me* holding where the titles contain no prohibition against subinfeudation or against an alternative holding. An *a me* holding, if they do contain such prohibitions, or either of them. Consolidation Act, 1868, § 6 re-enacting § 5 of the Titles Act, 1858, as explained by § 36 of the Titles Act, 1860.]

701. What is the import of the clause, "I resign the said lands and others for new infeftment"?

Before the Titles to Land Act came into effect, this clause was equivalent to a procuratory of resignation *in favorem*, and in conveyances by a vassal to his superior it was equivalent to a procuratory of resignation *ad remanentiam*.¹ But in conveyances granted after the Titles Act came into effect, a clause of resignation is held to import a resignation *in favorem* only, unless specially expressed to be a resignation *ad remanentiam*.² [A clause of resignation is now unnecessary.]

702. Is an obligation of warrandice, or an obligation to relieve of stipend and augmentations, transmitted by a general assignation of writs and evidents?

An obligation of warrandice being a right necessarily attaching to the lands, is transmitted along with them, and consequently passes by the general assignation of writs and evidents.³ But it has been held that an obligation to relieve of stipend and augmentations is a separable right, and one which does not run with the lands, and therefore is not transmissible by a general assignation of writs, but requires a special conveyance.⁴(*d*) [The Conveyancing Act (§ 50 and Sched. M.) provides a short form for assigning such rights of relief, &c., as do not pass under the general assignation of writs.]

¹ 10 & 11 Vict. c. 48, § 3.

² 21 & 22 Vict. c. 76, § 5.

³ Ersk. 2, 3, 31.

⁴ Horn, 23rd Jan. 1841, 8 D. 435; rev. 21st Feb. 1842, 1 Bell's App. 1; Sinclair, 16th Jan. 1844, 6 D.

378; rev. 14th Aug. 1846, 5 Bell's App. 358. See Lennox, 14th July. 1843, 5 D. 1857. This question has again arisen in the case of Sir W. D. Stewart v. the Duke of Montrose, *in pendente*, the parties stand-

(*d*) The case of Stewart here referred to was decided 15th Feb. 1860, 22 D. 755, when it was held by a majority of one of the whole Court that the obligation transmitted to and was enforceable by a singular successor of the vassal against the superior without special assignation, as the obligation,

703. What warrandice are trustees bound to give to a purchaser?

ing in the relation of superior and vassal. In addition to the plea, that the obligation of relief is transmitted by a general assignation of writs and evidents "and whole clauses thereof," it is maintained for the vassal, that the obligation being intended to be permanent, and so intimately connected with the subject of the feu that it can be available, as a profitable obligation to no one but him, it forms one of the condi-

tions of the feu-right, remaining in all time pleadable by the vassal against the superior, not as specially transmitted, but on the ordinary principles of mutual contract, and through the mere force of their relation to one another, as superior and vassal. The case has been remitted by the judges of the First Division for the opinion of the whole Court.(d)

occurring as it did in a feu-contract, was to be regarded as the counterpart of the vassal's obligations and an inherent condition of the feu. The judgment was affirmed by the House of Lords, 27th March, 1863, 4 M'Q. 499, 1 M'P. 25. It was also held in this case that the obligation might be enforced beyond the value of the superiority. The result of the cases referred to seems to be—

1. That where the obligation is perfectly collateral to the subject-matter of the contract, and the granter is thereby divested of that subject-matter, so that there arises out of the contract no privity of estate between the contracting parties, the obligation is merely personal, and not transmissible, except by special assignation, and any one claiming under it must show that it is so vested in his person. Of this the case of Horn (*supra*, note 4) was an example. There the contract was one of absolute sale, after which the seller and obligant ceased to have any connection with the lands, and the conveyance constituted no relation between the parties in reference to the lands, so that the obligation was merely personal, and transmissible only in the same way as other simple personal obligations.

2. That where the obligation forms a condition in a contract in which it is the counterpart of other obligations undertaken by the other contracting party, and where the contract does not divest the obligant of the lands, but leaves him with an interest and estate therein, and constitutes between the parties the relation of superior and vassal, so that there is a privity of estate between them, the right transmits to the vassal's successors in the feu, and can be enforced against the superior at all events where he is the personal representative of the granter of the obligation. This was the case of Stewart, *supra*, note 4 (see *infra*, 4); but—

3. That even where the obligation is in the original feu-right, if it is sought to be enforced against the personal representative of the granter, but who is not the superior, the vassal must show that the right has been transmitted to himself by assignation. This was the case of Sinclair (*supra*, note 4), where the action was brought against M. of Breadalbane, who was the personal representative of the granter, but was not superior of the lands, the

Warrandice from fact and deed *qua* trustees, with an obligation on the heirs and representatives of the truster to warrant the conveyance at all hands, and they may be required to grant an assignation to the clause of warrandice in the trust-deed, if it contains such a clause.

704. In what cases is it unnecessary to record the whole conveyance in order to obtain a real right; and how is such partial registration effected?

(1) Where a conveyance of lands is contained in a deed granted for further purposes and objects, such as a marriage-contract, deed of trust, or deed of settlement, it is unnecessary to record the whole deed; but it is sufficient to expedite and record a notarial instrument, setting forth generally the nature of the deed, and containing at length those portions of it by which the lands are conveyed, and the burdens are imposed.

(2.) Where a deed conveys separate lands, or separate interests in the same lands, to the same or different persons, it is sufficient to expedite and record a notarial instrument, setting forth generally the nature of the deed, and containing at length the parts of the deed by which particular lands are conveyed to the person in whose favour the instrument is expedite, and the part which specifies the nature and extent of his right and interest with the real burdens, if any. [By section 17 of the Consolidation Act, 1868, it is now competent to record a notarial instrument on any disposition.]

right having been alienated, and where the plea of want of title by special assignation was sustained.

4. From some observations in *Stewart* in House of Lords, it might seem that the question as to the effect of the superior being a singular successor was intended to be reserved. The point might have been tried, and possibly might have led to a different result in *Sinclair*, where Sir Ralph Anstruther, the superior at the time, was made a party to the action, but against whom the pursuer, for some unexplained reason, did not insist. As, however, a vassal has been allowed, without a special title (*Stewart*), to enforce the obligation against the representative of the granter, being the superior, while as against the representative, not being the superior (*Sinclair*), he was not allowed to do so, it may probably be assumed that the obligation will transmit and be enforceable against the superior, though not the representative of the granter, and that in regard to it the superior and vassal for the time will always stand in the same position to each other as the original parties did, with a privity of estate between them. See *Campbell's Trs.*, 17th Nov. 1865, 4 M'P. 50.

(3.) It is competent to insert in a conveyance, immediately before the testing clause, a clause of direction specifying the parts which the granter desires to be recorded, and the recording of such parts, together with the clause of direction, and the testing clause, and a warrant of registration, has the same effect as if a notarial instrument containing such parts had been expedite and recorded in favour of the party in whose behalf the conveyance is presented. But the whole conveyance may be recorded^(e) or a notarial instrument expedite and recorded, notwithstanding such clause of direction, provided the notarial instrument contains the whole parts directed to be recorded.¹ [Consolidation Act, § 12.]

705. What should be the terms of the warrant of registration, when the deed contains a clause of direction?

Register on behalf of A B, in terms of the within written clause of direction, and of the relative provisions of the Titles to Land (Scotland) Act, 1858.^(e) [Schedules F, Nos. 1 and 2, of the Consolidation Act give forms of the clause and warrant of direction.]

706. Where the disponent has obliged himself and his heirs to infest the disponent by two manners of holding, and the disponent has taken infestment on the disposition; May the disponent's heir be required to make up a title so that the disponent may continue to hold of him?

No; because the granting of the disposition containing warrants enabling the disponent to take the disponent's place is full implement of his obligations to the disponent.²

(See Completion of Disponent's Title.)

¹ 21 & 22 Vict. c. 76, §§ 2, 3.

² Dundas, M. 15035.

(e) This is now regulated by the Titles to Land Act, 1860, § 25, which provides that if the clause of direction is intended to be acted on, there shall be "express reference thereto in the warrant of registration, if any, which, in terms of the recited Act or this Act, is otherwise required to be indorsed on such deed or in a separate warrant of registration, &c.; "and in the absence of such express reference," &c., "such deed shall be engrossed in the register as if it had contained no clause of direction."

VI. CHARTERS OF CONFIRMATION AND RESIGNATION.

[The fourth section of the Conveyancing (Scotland) Act, 1874, abolished charters and writs by progress, except charters of novodamus or precepts or writs from Ohancery or of *clare constat*, or writs of acknowledgment. It has been thought better, however, to retain the following questions.]

707. What were the original purposes of the charter of confirmation ; and what is its modern use ?

The form of confirmation was anciently used by barons and prelates to ratify the grants of their predecessors, and likewise to express the superior's consent to subinfeudation. The modern purpose of the charter of confirmation is to dissolve the superior's relation to the vassal, and to substitute the new vassal in his place.¹

708. Explain the difference in effect betwixt confirmation of an infeftment *de me*, and of an infeftment *a me*.

(1) Confirmation of an infeftment *de me* (now obsolete) merely protected the sub-vassal from casualties inferring forfeiture of the feu, incurred by his immediate over-superior ; but it did not raise the sub-vassal into the vassal's place. (2) Confirmation of an infeftment *a me* completely divested the former vassal and invested the new vassal in his full right and place, the confirmation operating *retro* to the sasine ; thus validating not only the title confirmed but all subsequent (*f*) precepts of sasine and procuratories of resignation, with the instruments following upon them.

709. What is the effect of a charter of confirmation which confirms only the lands and the last sasine, there being a series of unconfirmed rights ?

It operates as a confirmation in favour of the grantee, so far as regards the lands, of the whole dispositions and instruments of

¹ Ross Lect. ii. 257 ; Duff's Feud. Conv. 212.

(*f*) There seems to be some mistake here ; a confirmation of a particular title would not validate any other subsequent in date to it, nor, until the 10 & 11 Vict. c. 48, did it validate titles prior in date.

sasine, and other deeds, instruments, and writings of and concerning the same, necessary to be confirmed, in order to complete the grantee's investiture in the lands as immediate vassal of the superior; and that although such deeds, instruments, and writings may not be enumerated or set forth in the charter.¹(g) [Consolidation Act, 1868, § 115.]

710. In a competition of rights completed by confirmation, on what date does the preference depend?

In Crown charters it is the date on which the Great Seal is affixed;²(h) and in charters by subject-superiors, the date of delivery of the charter.³(i) [The provisions of the 1860 Act mentioned in the note are substantially re-enacted by § 6 of the Consolidation Act, 1868.]

711. What were the provisions of the Titles to Land Act, relative to entry by confirmation, where the lands are held of a subject-superior?

(1.) Where a confirmation of any deed or instrument recorded

¹ 10 & 11 Vict. c. 48, § 7.

³ Dalziel, 2 Br. Sup. 81.

² Ersk. 2, 7, 14.

(g) This is not quite accurate. The provision of the 10 & 11 Vict. applies only to the case where the charter confirms the lands, "and the instrument of sasine in favour of the person receiving such charter." Where therefore the person entering was not himself infeft, as in an entry by resignation and confirmation, it was necessary to confirm *all* the prior titles; and it is important to keep this in view in examining titles made up under that Act as well as those made up prior to its date.

(h) By 10 & 11 Vict. c. 51, § 15, it was provided that "the date of sealing shall in all cases be held and expressed to be the date of the charter," and, by the Titles Act, 1858, § 32, sealing is declared unnecessary unless when required by the receiver of the charter (*infra*, note (p), p. 354); the date therefore now regulates the preference.

(i) This was the rule prior to the passing of the Titles to Land Act, 1860; but it is by that Act provided (§ 36) that where no manner of holding is specified, and the investiture prohibits subinfeudation, "the conveyance or instrument shall, if an entry" "be expedite with the superior within twelve months from the date of such conveyance or instrument, have the same preference in all respects from the date of recording in the appropriate register of sasines the conveyance or instrument as if the same contained an *a me vel de me* holding, and the investiture did not contain any prohibition against subinfeudation or against an alternative holding."

in the Register of Sasines is required, it was competent to the superior to confirm such deed or instrument by a writ of confirmation, to be written on the deed, confirming the deed in favour of the grantee, but only in so far as consistent with the last(*j*) charter and the superior's own rights.

(2.) The confirmation so granted is declared to be as effectual, to all intents and purposes, as a charter of confirmation under the former law and practice. [These provisions were substantially re-enacted by the Consolidation Act, 1868, § 98.]

(3.) The confirmation is held to confirm the whole prior deeds and instruments necessary to be confirmed, in order to complete the investiture of the party obtaining the confirmation.¹ [Consolidation Act, 1868, § 115.]

712. What are the object and contents of the *quæquidem* clause?

The object of the *quæquidem* clause is to express the *modus vacandi*, or the manner in which the property has returned to the superior, and the purpose for which the resignation has been made. It bears that the lands formerly pertained heritably to the former vassal, holden by him of the granter of the charter as immediate lawful superior thereof, and that they were resigned by him in virtue of the procuratory contained in the disposition in the hands of the superior, in favour and for new infeftment to be granted to the disponent.²

713. What were the provisions of the Titles to Land Act, with respect to entry by resignation, where the lands are held of a subject-superior?

(1.) Where a new investiture by resignation was required, it was competent for the superior to grant in favour of the party in right of the deed, which was the warrant for resignation, a writ of resignation, to be written on the deed, by which the superior, in respect of the clause of resignation, disposed to the disponent the

¹ 21 & 22 Vict. c. 76, § 7.

² Ross Lect. ii. 288.

(*j*) The reference in the writ need not be to the *last* charter. See Schedule E, annexed to Act.

lands contained in the deed, but only in so far as consistent with the last charter(*m*) and the superior's own rights.

(2.) The writ of resignation so granted was declared to be as effectual, to all intents and purposes, as a charter of resignation under the former law and practice.

(3.) The superior was bound to grant such a writ of resignation, if required so to do, but subject to the same provisions as were made in the case of writs of confirmation.¹

(4.) The writ of resignation was held to operate as a confirmation of all prior deeds and instruments necessary to be confirmed in order to complete the investiture.

(5.) It was competent to record in the Register of Sasines the deed, with the writ of resignation, and a warrant of registration, and the recording of the same has the same force and effect as if a charter of resignation had been granted and followed by infeftment at the date of recording the deed and writ in favour of the party in whose behalf the deed and writ are presented for registration. [Section 99 of the Consolidation Act, 1868, re-enacts § 9 of the 1858 Act, as amended by § 33 of the 1860 Act.]

714. Is the superior, in all cases, entitled to insist on the insertion of the tenendas and reddendo in charters by progress?

The superior is not entitled to insist on the insertion of the tenendas and reddendo where these clauses are contained in any charter or other writ recorded in any public register; it being sufficient to refer to the tenendas and reddendo as set forth in such recorded writ.² [Consolidation Act, § 100.]

715. What was the effect of a mid-impediment in connection with confirmation; and how might such mid-impediments be produced by voluntary conveyance?

A mid-impediment prevented the retroactive effect of confirmation; and it might be produced by any intermediate right by which the disponent was divested before the investiture of the disponent was

¹ See Ans. 712.

² 21 & 22 Vict. c. 76, § 10.

(*m*) The schedule requires reference only to "a charter or other writ." See note (*j*), p. 332.

completed. And (1) where the disponee's title was an unconfirmed *a me* infeftment, a mid-impediment might be produced by a subsequent infeftment *de me*, or *a me vel de me*, or an infeftment *a me* first confirmed ;(p) (2) where the disponee's title was an infeftment *a me vel de me*, the prior confirmation of a subsequent *a me* infeftment had the effect of preventing the disponee from making his infeftment public, and holding immediately of the superior.

716. In what cases might a charter of resignation and confirmation combined be used ?

(1.) Where a disponee had acquired right by disposition *a me vel de me*, or *a me*, with procuratory of resignation from one infeft but unentered, he might be entered with the superior by a charter of resignation and confirmation, by which the infeftment of the disponee's author was confirmed, and resignation made on the second procuratory, the infeftment being thus made public from its date, and the disponent's procuratory rendered a valid warrant for resignation in favour of the disponee. This form might be used whatever may be the number of the base rights, care being taken that the confirmation shall end with the sasine in favour of the granter of the disposition upon which the resignation proceeds.

(2.) Where a disponee had acquired right by disposition *a me vel de me* from one infeft, but not entered, and had taken infeftment on the disposition, it has been held (although the propriety of the decisions has been questioned) that he might complete a title by infeftment on a charter of confirmation and resignation, confirming both his author's infeftment and his own infeftment on the disposition in his favour, and proceeding on the procuratory contained in that deed. The disponee had thus a double title, one by resignation and the other by confirmation ; and it has been decided that they did not destroy one another, since the obligation to infeft authorises entry by resignation or confirmation, or both, the one without prejudice of the other.¹

717. A, infeft but unentered, disponed to B by disposition

¹ Stewart, 20th Feb. 1827, 5 S. 383. See Menzies Lect. 768 (811).

(p) See provision of Titles to Land Act, 1860, referred to in note (i), p. 331.

a me vel de me, with procuratory and precept, and B took infeftment and dispones to C, who, without taking infeftment on the disposition, was entered by the superior by a charter of resignation and confirmation combined; State the contents of the *quæquidem* clause.

Which lands and others above described formerly belonged to B, holden by him in virtue of the confirmation hereinafter contained immediately of me as superior thereof, and have been resigned by him into my hands, in virtue of a clause of resignation contained in a disposition of the said lands and others granted by him in favour of the said C, dated, &c.¹

718. Where a charter by progress does not contain a clause reserving the superior's rights, is he precluded from insisting in rights competent to him in the *dominium utile*? State the reason.

No; because superiors being bound to grant charters by progress, they are given *periculo petentis*, and without prejudice to the superior's rights.²

719. What was the effect of an entry by a superior whose title is personal?

The entry was absolutely null; but it was capable of being validated by the subsequent infeftment of the superior, (r) provided (1) that the superior's title be completed during his life; (2) that the superiority had not in the meantime been carried off by the diligence of creditors; or (3) that it had not been conveyed to another disponee whose right had been made real.

(See Completion of Disponee's Title.)

¹ Jur. St. 4th edit. i. 416.

² B. of Glasgow, M. 6516; Forbes, M. 6517.

(r) Martin, 3rd Feb. 1841, 3 D. 485. The expression "absolutely null" is perhaps not quite appropriate, as such an entry could hardly admit of being validated; it is *ineffectual* unless, and until, validated.

VII. DISPOSITION AND ASSIGNATION.

720. In what cases was the disposition and assignation used ; and explain the difference betwixt the executive clauses of that writ and those of an ordinary disposition ?

The disposition and assignation was used where the seller's title is personal. It contained all the clauses of the ordinary disposition, with the exception of a procuratory of resignation and precept of sasine, the disponent's title being completed in virtue of the unexecuted warrants in favour of the seller, the transference of which was the essence of the conveyance. [See Jur. Styles, i. 153, as to case where disposition and assignation should still be used.]

721. Might a personal right to lands be effectually transmitted without dispositive words before the Titles Act came into effect ?

A personal right to lands might be effectually transmitted by a simple assignation of the unexecuted procuratory or precept without the use of dispositive words, provided it appeared from the terms of the assignation that its object was to transmit the right, and to enable the assignee to obtain infeftment.¹

722. What is the criterion of preference in the transmission of personal rights to land ?

(1.) While the rights continue personal, the date of the transmission(*t*) is the criterion of preference, personal rights to land being incapable of intimation.

(2.) But there is a distinction betwixt a personal right and a mere *jus crediti* to demand a conveyance. Where the latter has been transferred to an assignee, he may acquire a preferable title to it by intimation ; and it has been held that registration in the Register of Sasines of the writ importing a conveyance of the *jus crediti* is equivalent to intimation.²

¹ Renton, 5th Dec. 1837, 16 S. 184 ;
aff. 18th Aug. 1843, 2 Bell's App. 214.

² Edmond, 16th Nov. 1855, 18 D.
47 ; aff. 16 Feb. 1858.(u)

(*t*) Rather "the date of the completion of the right by infeftment or its equivalents," because, if a subsequent assignee were to get delivery of the titles constituting the personal right, and complete his right, he would be preferable to a prior assignee whose right had not been completed.

(u) 20 D. 5 ; 3 M'Q. 116.

723. Enumerate the clauses of an instrument of sasine in favour of a party who had acquired right by disposition and assignation.

(1) The production to the notary of the conveyance containing the warrant of sasine, and also of the disposition and assignation. (2) The narrative of the dispositive clause of the former conveyance. (3) The deduction of the disposition and assignation. (4) The recital of the obligation to infeft, and the insertion of the precept. (5) The giving of sasine in virtue of the precept and transmission thereof; and (6) the testing clause.

724. A, whose title was complete, disposed to B, with obligation to infeft *a me vel de me*, procuratory and precept, and B was infeft. The lands were afterwards disposed with similar clauses by B to C, who transferred his personal right by disposition and assignation to D; and D entered with the superior by charter of resignation and confirmation. State the contents of the *quæquidem* clause in the charter.

Which lands and others above described, formerly belonged to B, holden by him in virtue of the confirmation hereinafter contained immediately of me as superior thereof, and have been resigned by him into my hands by virtue of a clause of resignation, contained in a disposition of the said lands and others made and granted by him to C, dated the _____ : In and to which disposition the said D has right by disposition and assignation granted by the said C in his favour, dated, &c.

725. Where a party holds lands in virtue of an unrecorded conveyance, with a holding *a me vel de me* and precept of sasine; What are the forms of conveyance by which he can transfer his personal right to a purchaser, and how can the latter make his right real?

(1.) Simple assignation of the precept of sasine, and infeftment in virtue of the precept and assignation.

(2.) Disposition and assignation, and infeftment as above.

(3.) Disposition with precept and infeftment, the right of the granter being afterwards completed by infeftment upon the original

precept, which will render the purchaser's infeftment valid by accretion.^(v)

[(4.) Assignation in the form prescribed by the Consolidation Act, § 22, which in substance repeats the provisions of the prior Acts, either separate from or written upon the unrecorded conveyance. The title of the assignee can be completed in either of three modes—(1) registration of the disposition by the proprietor last infeft and assignations, the disposition having a warrant in favour of assignee, and the assignations being docqueted with reference thereto; (2) by recording the disposition along with a notarial instrument on it and the assignations; (3) by registration merely of a notarial instrument on the disposition and transmissions. *Jur. Styles*, i. 155 to 159.]

726. What is the nature of the conveyance granted by (1) an heir unserved, whose ancestor was infeft, and (2) by one whose ancestor was not infeft; and how does the disponee, in each case, acquire a real right?

(1.) A conveyance by an heir unserved, whose ancestor was infeft, in addition to the ordinary executive clauses, contains an obligation by the granter to procure himself duly and lawfully served heir to his ancestor, and infeft and seised in due and competent form, and it likewise contains a procuratory for that purpose. In order to obtain a real right, the disponee will take infeftment on the disposition, or record it in the Register of Sasines, and then cause the granter's title to be made up by service and infeftment or registration, which will accresce to and validate his own right.

(v) By the doctrine of Accretion, "Whatever right befalleth to the author after his disposition or assignation accresceth to his successor, to whom he had before disposed, as if it had been in his person when he disposed, and as if it had been expressly disposed by him;" *Stair*, 8, 2, 1; *Ersk.* 2, 7, 3 and 4 *Bankton*, 8, 2, 16. In such a case as is put in the answer, it was quite admitted that the principle operated, but in regard to a different case Bell expressed a doubt; he said (*Prin.* § 882)—"If the granter of the precept have at the time no right to the subject, but acquire a right by subsequent title, it may be doubted whether accretion will take place;" but this view has been overruled; *Swan*, 22nd March, 1866, 4 M.P. 663, where it was held that in such circumstances accretion did take place. In *Munro*, 4th July, 1844, 6 D. 1249, which was a similar case, accretion was prevented by a mid-impediment. See question as to accretion, *Gilmour*, *supra*, note (x), p. 323.

(2.) Where the ancestor was not infeft the conveyance takes the form of a disposition and assignation, or assignation, and contains a procuratory for the service of the granter as heir in general; and a real right may be acquired by notarial instrument. But the service must be first expedite, as it is essential that the decree be deduced in the notarial instrument.¹

[Branch 2 of this Answer is altered from that in the last edition.]

VIII. DISPOSITION OF SUPERIORITY AND CONSOLIDATION.

727. In what respects is the superior restrained in regard to the disposal of the superiority?

(1.) The superior cannot, without the vassal's consent, dispose of the superiority to be held of himself so as to interject a mid-superior; because the vassal would be farther removed from the Crown, and would have one superior more to charge for an entry before he reached the Crown, on the failure of intermediate superiors. But such a conveyance is not a nullity, the objection being competent only to the vassal. Where the superior has succeeded by forfeiture to his vassal, and has thus become superior of the sub-vassal, he may revive the intermediate superiority unless he has given the sub-vassal an entry.²(y)

(2.) The superior cannot, without the consent of the vassal, split the superiority into parts where there is one fee and one

¹ Duff's Feud. Conv. 203; Menzies Lect. 629 (661).

² Stair, 2, 4, 5; Ersk. 2, 5, 4; Bell's Prin. 857.

(y) This qualification is not quite in conformity with the doctrine of Stair and Erskine. Stair says—"Superiors must receive and infeft their sub-vassals upon the refusal or incapacity of the vassal, and may at any time thereafter receive the immediate vassal or his successor or another if the immediate vassal's right be extinct or acquired by the superior." Erskine says—"Such superior is entitled by the nature of the feudal contract to provide a new vassal for himself in the room of the forfeiting person," "unless he has by some deed accepted the sub-vassal as his immediate vassal;" but for this effect probably a grant of the mid-superiority would be necessary; merely receiving him as vassal is not sufficient; Gordon, M. 10975; Argyll, M. 15013.

reddendo, so as to impose on the vassal a plurality of superiors; but the vesting of the superiority in two or more jointly, and *pro indiviso*, is not an infringement of this rule. Where separate subjects, held of the same superior, have been acquired by the same vassal, he is not entitled to demand that the several subjects shall be embraced in one charter, nor can he object to the superior selling the superiorities to different parties; and although the superior should have included the separate subjects in one charter, having distinct *quæquidem* and reddendo, it is still competent to sell the superiorities separately.¹

728. Point out, and explain, the peculiar clauses of a disposition of superiority.

(1.) In the dispositive clause the lands themselves are conveyed, the *dominium directum* being the radical right. But a conveyance of the superiority would be an effectual transmission.^{2(z)}

(2.) The obligation to infeft is usually *a me* only, as a holding *de me* would create an interjected superiority, to which, if permanent, the vassal is entitled to object. But an alternative holding has been recommended; because, although the vassal did object to the title, it would be as easy to get confirmation of a disposition *a me vel de me*, as of one *a me* only, while the disponee would, in the meantime, have all the advantages of an indefinite infeftment.³ [A clause of holding is not now necessary.]

(3.) The disposition contains an assignation, not to the rents, but to the feu-duties and casualties.

(4.) The clause of warrandice contains an exception of the feu and other rights and infeftments of property granted by the disposer and his predecessors.

729. When the superiority and property of an estate are vested separately in the same person, how may they be consolidated?

¹ Stair, 2, 4, 5; Bell's Prin. 859.

³ Duff's Feud. Conv. 204.

² Gardner, 9th Feb. 1841, 3 D. 534.

(z) It was so held in Hamilton, 23rd Feb. 1819, F.C. In Gardner, cited, opinions to the same effect were expressed, but the point was not there decided.

(1) Consolidation of the two fees can be directly accomplished only by the proprietor, as vassal, making resignation *ad remanentiam* of the *dominium utile*, in his own hands as superior.¹ (2) But if there has been possession for forty years on the superiority title, which is a good title to the lands, the base infeftment will be worked off, and the two fees effectually consolidated by prescription,² provided they stand destined to the same series of heirs.^{3(c)}

¹ Bald, 8th March, 1786, M. 15084 ; aff. 8th April, 1787, M. 15089.

² Durham, M. 11220 ;(b) Wilson, 29th Nov. 1839, 2 D. 159, p. Lord

³ Middleton, M. 10944 ; Graham,(a) Mackenzie.(c)
6th Aug. 1840, H. of L., 1 Rob. App.
347.

(a) In Court of Session, Bontine, 2nd March, 1837, 15 S. 711.

(b) Durham was a case, not of possession of property on superiority title, but of double titles, as to which see note (c), *infra*.

(c) The opinion of Lord Mackenzie here referred to states the view at that time generally entertained on the point ; but since then a case has occurred in which, with his Lordship's sanction, a more extensive effect was given to prescriptive possession on the superiority title ; Dalrymple, 10th March, 1841, 3 D. 837. Here a party who held the property of lands under one title, with a destination to *heirs-male*, acquired the superiority by a title with a destination to *heirs-of-line*. Both titles remained for some years personal ; thereafter a feudal title was completed in the superiority, and the lands were possessed on it for more than forty years without any valid feudal title being made up in the property. Held that the possession on the superiority title extinguished the base title to the property ; *per* Lord Cuninghame—"It is a general rule of law that when a party holds a diversity of titles to the same lands, his possession ought to be ascribed to that title which it is most for his interest to hold by. But it was obviously the interest of the Earls of Stair to ascribe their possession of Cults to their title of superiority rather than to the conveyance of the *dominium utile*. The title of superiority was the more unlimited of the two rights, as Linn's conveyance of the superiority was to heirs whatsoever, while Lord Bargany's disposition of the property was limited to heirs-male. On this ground, it is thought that in general the heirs were entitled to have their possession ascribed to the more general right constituted by the conveyance of the superiority rather than to a right limited to heirs-male, which was the destination of the *dominium utile*." *Per* Lord Moncrieff—"It is true that the resignation was apparently on the procuratory in the title of the superiority, but I think the argument sound, that in the circumstances the investiture in the lands was sufficient to carry the *plenum dominium*, holding the *dominium utile* to have been sunk in or consolidated with the superiority by long possession on the title of Linn." "In holding, therefore, that the sixth and seventh Earls, by their possession on the investiture 1791, extinguished any possible right under

730. What is meant by resignation *ad remanentiam*; and

the separate title by the procuratory in the *dominium utile*, I am only holding that they must be considered as having possessed on that which was their best title, and to which no unlimited or less-limited title stood opposed." *Per Lord Mackenzie*—"I am willing to adopt the opinions as to the extinction of the base right to Cults by prescription on the feudal title under the Crown."

The principle here referred to seems to have been recognised in Bruce, 6th Dec. 1770, M. 10805; aff. M. 10809, where it was found that "An infeftment in fee-simple upon a precept of *clare constat* in the superiority of lands contained in a deed of entail, with possession maintained of said lands for forty years, but which, *quoad* the property thereof, had been originally acquired upon a different title, viz., the right of apparency, was sufficient by prescription to work off the limitations of the entail, and to establish a right both to superiority and property in fee-simple." If this case is to be held as authority on the point, there seems to be no necessity for the superiority and property being destined to the same series of heirs in order to consolidation.

Besides the cases cited in the author's notes, see Harvie, 24th Jan. 1822, 1 S. 277; Walker, 27th Feb. 1827, 5 S. 469, F.C.; Elibank, 21st Nov. 1833, 12 S. 74. Graham is reported in Court of Session under name of Bontine, 2nd March, 1837, 15 S. 711.

Another point may be here noticed, viz., *Double Titles*. It sometimes happens that the same person succeeds to a property under two different titles, as heir of investiture, and as heir or dispennee under a deed of settlement or marriage-contract, but is under no restraint, as by entail, to possess exclusively under the latter. The general rule is, that every fee-simple proprietor having right under various titles is understood to possess equally by virtue of every title available to him, even though he should complete a title under only one of them, and the mere fact of his making up a title as heir-of-line does not defeat or evacuate the destination under a settlement; Snodgrass, 16th Dec. 1806, F.C. Neither does possession for forty years on such a title; Smith and Bogle, M. 10803; Durham, 11220; Zuill, 4th March, 1813; nor a trust-deed for payment of debt followed by reconveyance; Ogilvy, 26th May, 1837, 15 S. 1027. It follows from this, that though the party may sell, yet if he does not, and if the personal right comes at any time, however distant, to call to the possession a person different from the heir of investiture, it will determine the right to the estate; to prevent which the personal right must be taken up and evacuated by a new destination (which is called *sopiting*), and is held to be effected in all cases where a renewal of the investiture to a new series of heirs, or to heirs and assignees, is obtained by resignation and new charter; Molle, 18th Dec. 1811, F.C.

If, however, one of the titles be a limited right, as an entail, the limitation may be wrought off and the destination defeated by prescriptive possession on an unlimited title; Makdougall, M. 10947; Kirkness, M. 10955; Ayton, M. 10956; and H. of L., M. 10959. The principle of the distinction between this class of cases and that of Smith and Bogle, &c., *supra*, is that, where

what steps were necessary for completing such resignation before the passing of the Titles to Land Act?

Resignation *ad remanentiam* is a resignation of the feu by the vassal into the hands of the superior for his own behoof, in order that the right of property standing in the person of the vassal might be united and consolidated with the right of superiority in the person of the superior in all time coming. Before the passing of the Titles to Land Act the steps necessary for completing resignation *ad remanentiam* were—(1) a procuratory of resignation *ad remanentiam* by the vassal, his own title being complete.¹ (2) The ceremony of resignation in the hands of the superior, or his commissioner, or his known agent, by delivery to him of a pen by a procurator for the vassal, in presence of a notary and witnesses. (3) A notarial instrument of resignation *ad remanentiam*, containing a narrative of the ceremony; and (4) registration of the instrument in the Register of Sasines within sixty days of its date.

731. What changes and modifications were introduced with respect to resignations *ad remanentiam*, by the infestment Act, 1845, the Lands Transference Act, 1847, and the Titles to Land Act, 1858, respectively?

(1.) By the Infestment Act, the notary's docquet in the instru-

¹ See *Ans.* 732 (2).

both titles are fee-simple, there is, until the two destinations separate, no one, *valens agere*, that is entitled to challenge, so as to interrupt prescription, while under an entail any heir can compel the one in possession to make up his title under it. Whether or not the principle recognised in *Dalrymple, supra*, may operate in cases of double titles (holding the right under a special destination, as to heirs-male, to be in one sense a more limited right) so to modify the rule laid down in *Smith and Bogle, &c.*, has not been decided; but in *Ogilvy, supra*, Lords Gillies, Mackenzie, and Corehouse, all expressed opinions unfavourable to the decisions in *Smith and Bogle, &c.*, though they held themselves bound to give effect to them.

It has been objected that the decisions in such cases as *Smith and Bogle*, and *Wilson, supra*, note 3, p. 341, are inconsistent, and so perhaps in one view of the effect of prescription they are, but the supposed inconsistency arises from not keeping in view that the first case was one of double titles to the same property, while the second was one of two fees, with one title to each, that is, the property and superiority standing on separate titles; and that the Court have ruled that the two classes of cases fall under the operation of different principles.

ment was dispensed with ; and it was enacted that resignation might be accepted on behalf of the superior by his known agent for the time, as well as by a special commissioner.¹

(2.) The Lands Transference Act enacted that, in conveyances by a vassal to his superior, the short clause of resignation should be equivalent to a procuratory of resignation *ad remanentiam*.²

(3.) The Titles to Land Act provides—(1) that it shall not be necessary to expedite and record an instrument of resignation *ad remanentiam*, on any procuratory, or on any conveyance containing an express clause of resignation *ad remanentiam*; but that it shall be sufficient for the superior to record the procuratory or conveyance with a warrant of registration thereon, or to expedite and record a notarial instrument in the form of Schedule B, the ceremony of resignation, when either of these forms is used, being virtually dispensed with. (2) All instruments of resignation *ad remanentiam* may be in the new form, in Schedule D ; and when in such form, may be recorded at any time during the life of the party in whose favour the resignation is made. (3) A general clause of resignation in any conveyance shall import a resignation *in favorem* only, but it is competent to expedite and record an instrument of resignation *ad remanentiam* on a conveyance granted before the passing of the Act, and containing a general clause of resignation.³ [This provision is substantially re-enacted by § 18 of the Consolidation Act, 1868.]

732. Does resignation *ad remanentiam* in the hands of a proprietor of an entailed superiority bring the *dominium utile* within the fetters of the entail ?

It is thought that resignation *ad remanentiam* does not bring the property within the operation of the entail, unless the resignation is made under burden of the conditions and provisions of the entail, and the other requisites of the Act, 1685, are observed for giving efficacy to the fetters.⁴

[733. What are the provisions of the Conveyancing Act, 1874, as to consolidation ?

(1.) When the same person has acquired and is infeft in both

¹ 8 & 9 Vict. c. 35, § 8.

² 10 & 11 Vict. c. 48, § 8.

³ 21 & 22 Vict. c. 76, §§ 4, 5, 19.

⁴ Duff's Feud. Conv. 498.

superiority and property, he may consolidate both fees by signing and recording a minute in the form of Schedule C, § 6.

(2.) Such consolidation is not to affect or extend the rights of an over-superior, § 7.]

734. Where the feu is re-acquired by the superior, Is it charged with the burdens imposed on it by the vassal?

(1) Where the feu returns to the superior by the operation of the feudal casualties, it reverts to him as free from burden as when the right was first granted. But the rule does not apply to liferent escheat, by which casualty no higher right accrues to the superior than was vested in the vassal himself at the time of its falling.¹ (2) When the superior re-acquires the feu by resignation *ad remanentiam*, it continues to be charged with all the burdens imposed on it by the vassal.²

(See Completion of Disponee's Title.)

IX. COMPLETION OF DISPONEE'S TITLE.

735. Prior to the Conveyancing Act, 1874, how might a disponee complete a public title under an ordinary disposition *a me vel de me*, the disponent being infeft and entered?

(1) By registration or infeftment, and writ or charter of confirmation; or (2) by writ or charter of resignation, and registration or infeftment, respectively.

[**736.** How does the disponee now complete his title on an ordinary disposition?

- (1.) By registration with a warrant.
- (2.) By notarial instrument.]

737. Prior to said Act, how might the disponee complete his title under a disposition *a me* only?

Either by confirmation or resignation, as in the preceding case; the only difference being, that infeftment or registration,

¹ Ersk. 2, 5, 79.

² Ersk. 2, 7, 21.

where the holding was *a me* only, conferred no real right till confirmation.

738. How would the donee complete his title if the holding were *de me*, but the disposition contained a procuratory of resignation?

By resignation and registration, or infeftment. If the donee were first to record the disposition, or take infeftment, it would still be necessary, in order to complete a public title, to obtain a charter of resignation, and record it, or take infeftment; but a split would thereby be occasioned; which, however, might be removed by resignation *ad remanentiam*.(g)

739. A donee, after recording his disposition, which contains an *a me vel de me* holding, obtained a crown-writ of resignation, and recorded the disposition and writ of new; What is the state of the title?

By registration of the disposition, the donee holds the property base of the seller, and by registration of the disposition of new, with the writ of resignation, the donee is vested with the mid-superiority left in the person of the seller. The donee thus holds a mid-superiority of the Crown, and the property of himself.

740. Prior to the Conveyancing Act, 1874, how might a donee complete a public title on an ordinary disposition *a me vel de me*, with procuratory and precept, the seller's title being a recorded but unconfirmed conveyance *a me* only?

The donee's title might be completed—

(1.) By infeftment on, or registration of, his disposition, and by charter or writ of confirmation, either of which operated as a confirmation of all previous deeds necessary to be confirmed.

(2.) Passing over the seller's unconfirmed infeftment, the dis-

(g) A disposition such as is here supposed would be anomalous and inconsistent in its terms. What its effect might be must depend on the circumstances which should lead to its adoption; but it may be possible that simple resignation and registration would split the fees, as that seems hardly a competent mode of destroying the effect of the *de me* holding.

ponee, having right to the precept in the seller's disposition by assignation to writs, might again take infeftment on it in his own favour, and obtain confirmation ;¹(*h*) or he might expedite a notarial instrument in the form of Schedule K (*j*) (Titles Act, § 14), and record the same along with the disposition in favour of the seller, and a warrant of registration ; or he might expedite and record a

¹ If the confirmation here were held to accresce to the seller's infeftment, this, of course, would be an incompetent method of completing the title, as the confirmation would operate *retro* to the date of the seller's sasine, and thus exhaust the precept on which it proceeded. In certain circumstances, it is true, the effect of confirmation cannot be restricted so as to validate one sasine and leave another unaffected. Thus the holder of a right flowing from a person whose infeftment had not been confirmed,

cannot obtain confirmation of his own and his author's infeftment, to the effect of leaving invalidated a prior infeftment flowing from the same author. But the circumstances here are different, and it is thought that the confirmation of the purchaser's infeftment would not accresce to the seller's sasine, the latter not being a deed or instrument "*necessary to be confirmed*" in order to complete the investiture of the party obtaining the confirmation."(*i*)

(*h*) It seems hardly consistent with legal principle to make the extent of the operation of the statutory provision regarding confirmation dependent on, or it may be variable with, the object and intention (not even declared) of the person receiving the confirmation ; but apart from this question, the course here suggested seems incompetent. It is true that a public title unconfirmed does not divest the grantor of the precept on which the sasine followed ; but supposing that sasine to be unobjectionable, the precept is exhausted, it has been used to the whole extent to which it was available, and does not admit of being thereafter assigned so as to be made the warrant of a new sasine. The recording of the disposition is by the Titles to Land Act declared to be equivalent to the expediting and recording of a sasine in favour of the person on whose behalf it is recorded. When it has been, as is here supposed, once validly recorded, it is to that effect exhausted, and recording it again is incompetent, and would not vest the party with any right capable of being confirmed. The answer involves the mistake of supposing that there can be two valid sasines in favour of different persons proceeding on the same precept.

(*i*) See note (*h*), *supra*.

(*j*) It is to be observed that § 14 of the Act and Schedule K refer to unrecorded conveyances ; but in the case supposed, the conveyance having been recorded, the provision does not apply to it, and the Act contains no warrant for recording of new in such a case. It certainly could not be so where the sasine proceeded on a disposition with an alternative holding ; and, for the reason stated in the note (*h*), *supra*, the fact of its being a public holding seems to make no difference.

notarial instrument in the form of Schedule B, (k) and then obtain confirmation ; or

(3.) The title might be completed by a charter or writ of resignation on the procuratory, in favour of the seller, the purchaser's connecting title being deduced in the charter or writ, and by infestment or registration ; or

(4.) By writ of resignation on the procuratory by the seller, the writ operating as a confirmation of all deeds necessary to be confirmed, and by registration ; or

(5.) By charter of resignation and confirmation, confirming the recorded conveyance in favour of the seller, and resigning on the procuratory in the disposition in favour of the purchaser ; and by infestment or registration.¹

[The provisions of the previous Statutes were substantially re-enacted by the Consolidation Act.]

741. A, whose title was complete, disposed to B by disposition with an *a me vel de me* holding and clause of resignation. He recorded his disposition in the Register of Sasines, and then obtained a charter of resignation. State the modes in which B's title might be completed before the Conveyancing Act, 1874 ?

B's title might be completed (1) by writ of confirmation by the superior, the charter of resignation being dropped from the progress ; or (2) by recording the charter of resignation ; which, however, would occasion a split, that must be removed by consolidation.

742. A, a Crown vassal, having a complete title, sold to B, who was infest ; B sold to C, who was infest ; and C sold to D, who was not infest, the dispositions being in the ordinary form, with holdings *a me vel de me*, and D entered with the Crown by resignation, before the passing of the Titles Act ; What form of writ did he then obtain, and what form of writ would he have got if his entry had been subsequent to the Titles Act, and before the Conveyancing Act ?

¹ Duff's Feud. Conv. 244.

(k) If the views stated in the preceding notes (h) and (j) be correct, the instrument here referred to must proceed on the second disposition alone.

(1.) Before the Titles Act the form of writ was a charter of resignation and confirmation, confirming B and C's infeftment, and proceeding on the procuratory in C's disposition to D.

(2.) Under the Titles Act, the form of writ is a writ of resignation, which has the effect of confirming the whole prior deeds and instruments necessary to be confirmed in order to complete the investiture. [Consolidation Act, § 81.]

743. B, infeft, holding of A, sells to C by disposition, with a holding *a me vel de me*; C is infeft, and sells to A; Specify the executive clauses of the conveyance, and state how A's title ought to be completed?

(1.) The executive clauses of the conveyance by C to A are the dispositive clause, and the clause of resignation *ad remanentiam*. [The latter clause is not now necessary.]

(2.) A's title will be completed as follows:—1, confirmation by A of C's infeftment; and 2, registration of the disposition by C to A, with a warrant of registration thereon, in the Register of Sasines. [Since the Conveyancing Act confirmation will be incompetent, and A can consolidate by Minute. See Ans. 733.]

744. A is superior of B's feu. B sells to C, who sells to D, both dispositions having an *a me vel de me* holding, and being duly recorded. D then purchases the superiority from A, and completes his title thereto; What steps are necessary for vesting in him the property and superiority as one fee?

(1.) A writ of confirmation by D in favour of himself, to extinguish the infeftments of B and C, and to make his own infeftment public [now incompetent].

(2.) Procuratory of resignation *ad remanentiam* by D, as vassal, in favour of himself as superior.

(3.) Registration of procuratory, with warrant of registration in the Register of Sasines.(m) [Consolidation Act, 1868, § 18.]

(m) The purchase and title in this case might be completed also as follows:—

1. A writ of confirmation by A in favour of D, which would evacuate the mid-superiority and make D hold immediately of A.

2. Deed of relinquishment by A (in consideration of the price) in favour of D.

[In lieu of these steps—(2) and (3)—D may now sign and record a minute of consolidation under the Conveyancing Act, 1874.]

745. Lands were sub-feued by A to B, disposed by B to C, and sold by C's heir to D, a singular successor of A in the superiority; each transfer, both of property and superiority, having been fully but separately completed, and the two fees consolidated, all after the passing of the Lands Transference Act, 1847, but prior to the Titles to Land Act, 1858; What steps were necessary for these purposes?

(1.) Transmission of the property—

1. Feu-disposition by A to B *de me*, and infeftment.
2. Disposition by B to C *a me vel de me*, or *a me*; and [a] infeftment and charter of confirmation by A to C; or [b] charter of resignation by A to C, and infeftment.
3. Precept of *clare constat* by A to C's heir, and infeftment; or special service by C's heir to his ancestor, and infeftment on decree of service and charter of confirmation by A to C's heir.
4. Disposition by C's heir to D, with a general clause of resignation which implied resignation *ad remanentiam*.

(2.) Transmission of the superiority—

Disposition by A to D *a me* or *a me vel de me*; and [a] infeftment and charter of confirmation by A's superior to D; or [b] charter of resignation by A's superior to D, and infeftment.

(3.) Consolidation—

Instrument of resignation *ad remanentiam* in favour of D, proceeding on the disposition by C's heir in his favour, and registration thereof in the Register of Sasines within sixty days.

746. A, publicly infeft, disposed by disposition *a me vel de me* to B. After B had registered his disposition, A granted a second disposition for a full price to C, who entered with the superior by resignation and infeftment; What is the nature of the rights of B and C respectively?

B's right to the property is secure, but his infeftment by

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3. Acceptance by D written thereon.
 4. Writ of investiture by the over-superior also written on the deed.
 5. Registration of Nos. 2, 3, 4, and 5 in the Register of Sasines; 21 & 22 Vict. c. 76, §§ 23, 24, and Schedule N. [Consolidation Act, §§ 110 and 111.]

registration being base there was left a mid-superiority in the person of A, which was vested in O by his infeftment on the charter of resignation. By C's entry with the superior B is prevented from making his infeftment public, and he will hold blench of O for an elusory duty.

747. A, publicly infeft, sold by disposition *a me vel de me* to B. After B had registered his disposition, A's heir made up a title to the mid-superiority by precept of *clare* and infeftment; Does the title made up by A's heir create a mid-impediment, preventing the completion of B's title with the superior?

No; because the heir is the same person in law as his ancestor, being bound by his deeds, and liable in warrandice of A's conveyance to B. This is merely a pressing forward of the right of mid-superiority into the person of the heir.¹

748. A, publicly infeft, disponed to B by disposition *a me vel de me*, with procuratory and precept. Without taking infeftment, B disponed by disposition and assignation to C, and thereafter granted a second disposition and assignation to D, who immediately took infeftment on the assigned precept. O then resigned upon the assigned procuratory, and obtained a charter of resignation from the superior, and infef ed thereon; What is the state of the title?

The *dominium utile* is vested in D, held by him blench of C, whose infeftment carries nothing more than the interjected superiority which was left with A after D's infeftment.

749. A, publicly infeft, disponed to B by disposition *a me vel de me*, with procuratory and precept. Without taking infeftment, B disponed by a similar disposition to C, who took infeftment on the precept therein; What was the effect of the infeftment, and how could C's title be made complete?

O's infeftment is null, as the precept upon which it proceeds was granted by one *non habente potestatem*, his title being personal. C's title might be completed—(1) by a charter of resignation, pro-

¹ Fullerton, 22nd Nov. 1833, 12 S. 117.

ceeding upon the procuratory contained in the disposition by A to B, and assigned to C by the assignation to writs in his disposition, and infeftment on the charter; or (2) by taking infeftment on the assigned precept contained in the disposition by A, and obtaining confirmation, C's first infeftment in these two cases being allowed to lapse; or (3) by infefting B upon the precept in the disposition by A, which will render C's infeftment on B's disposition valid by accretion, and obtaining confirmation of both sasines. [After 1874, if C's disposition had been recorded with a warrant the title could be rectified (1) by recording B's disposition with a warrant when accretion would take place; or (2) by passing a notarial instrument in the form of Schedule J, Consolidation Act, 1868, upon both dispositions.]

750. A, possessing upon a personal title, granted an heritable security to B, and afterwards an heritable security to C, upon which he immediately took infeftment. B, discovering that A was not infeft, got infeftment expedite in favour both of A and himself; What was the effect of the infeftments of A and B?

A's infeftment accresced first to C's infeftment, and validated it from its date, according to the rule *jus superveniens auctori accrescit successori*, and, being prior in date to B's infeftment, was thus rendered the preferable security.¹(n)

751. A, a Crown vassal, whose title was complete, disposed to B *a me vel de me*, with procuratory and precept. B obtained a Crown charter of resignation, but, without being infeft on the charter, took infeftment on the precept in the disposition. B then granted a disposition *de me* to C, on which he was infeft, and B afterwards took infeftment on the charter of resignation. C then sold to B. What was the state of the title, and how might B's right be completed?

¹ Paterson, M. 7775.

(n) But had B, instead of getting A infeft, expedite an infeftment in his own favour, proceeding on his bond and the precept in the disposition in favour of A, to which B had right under the assignation to writs in his bond, his security would have been preferable to C's. See Melvin, 17th June, 1843, 5 D, 1217.

By the infeftment of B on the disposition by A a base fee was constituted, held by B of A ; by the infeftment of C on the disposition by B another base fee was constituted, held by C of B ; and by the infeftment of B on the charter of resignation he was vested with the superiority left in the person of A. There are thus three fees, namely—(1) a superiority held by B of the Crown ; (2) a superiority held by B of himself ; and (3) the property held by C of B, the last being incapable of being made public by confirmation, as it proceeds on a disposition *de me* only. B's title may be completed as follows :—(1) B will obtain from C a disposition, with a procuratory of resignation *ad remanentiam* ; (2) he will execute and record in the Register of Sasines a procuratory of resignation *ad remanentiam* in his own favour of the mid-fee held of himself ; and (3) he will record in the Register of Sasines the disposition in his favour by C [or now—(1) by obtaining and recording a disposition in ordinary form from C ; and (2) by signing and recording two Minutes of Consolidation. See Ans. 733.]

X. CROWN CHARTERS.

752. What was the procedure for obtaining a Crown charter before the passing of the Crown Charters Act, 1847 ?

A signature, containing the substance of the charter required, was left with the Presenter of Signatures, and during term time presented to the Judges in Exchequer. It was afterwards revised by one of the Judges in Exchequer, who, along with the Writer to the Signet acting as agent, compared the description and red-dendo with the last charter. The signature was then signed by the Barons of Exchequer and the Presenter, and, after it had been recorded in the Exchequer Records, it was taken to the office of the Great Seal and stamped with the cachet, which was a stamp bearing a *facsimile* of the royal sign-manual. The signature, thus completed, was the warrant for a Latin precept under the Signet, directed to the Keeper of the Great Seal, and the precept was the immediate warrant of the charter, which was prepared in the office of the Director of Chancery. The Great Seal was then affixed, and a note of the date of sealing written on the charter and signed by the Keeper ; and after the date of seal-

ing had been entered in the register kept in Chancery, it was ready for delivery.¹

753. What was the procedure introduced by the Crown Charters Act?

A draft of the proposed charter is prepared and indorsed by a Writer to the Signet, and lodged at any time with the Presenter of Signatures [now Sheriff-Clerk of Chancery], together with a short note, praying for a charter in terms of the draft; and, along with such note and draft, there must be lodged the last Crown charter, retour, decree of service, or chancery precept of the lands, and all the title-deeds subsequent thereto, together with evidence of the valued rent, when necessary, and an inventory and brief of the titles; the date of lodging the note being marked thereon by the Sheriff-Clerk. The draft is revised by the Sheriff-Clerk along with the agent, and, after revisal, it is docqueted by both as approved; the composition being indorsed on the draft, and certified by the Sheriff-Clerk and Auditor of Exchequer. It is then transmitted to Chancery, where it is engrossed, and, after being sealed with the Great or Union Seal, (p) and recorded in Chancery, it is delivered to the applicant on payment of the duties and fees.² [Consolidation Act, 1868, § 64 *et seq.*]

754. Where the applicant is dissatisfied with the revisal, what is his remedy?

He may lodge a note of objections with the Presenter of Signatures, which are disposed of by the Judge in Exchequer, and his judgment, repelling or sustaining the objections, is the warrant for the preparation of the charter.³(q) [Consolidation Act 1868, § 74 *et seq.*]

¹ Menzies Lect. 782 (827).

² 10 & 11 Vict. c. 51, § 11 *et seq.*

³ 10 & 11 Vict. c. 51 § 2, *et seq.*

(p) By the Titles to Land Act, 1858, § 32, sealing of Crown charters is in all cases dispensed with, "unless the receivers of such charters shall require the appropriate seal to be appended;" and the statement in the testing clause with reference to the seal, "that the same is accordingly appended," is directed to be omitted except where the "seal is actually appended."

(q) The duties here referred to are now discharged by the Lord Ordinary in Exchequer causes; 19 & 20 Vict. c. 56, § 18; and as all interlocutors pro-

755. What is the procedure when application is made for a charter containing a clause of *novodamus*?

The party applying for the charter must, previously to lodging the note in the office of the Presenter of Signatures [now Sheriff-Clerk of Chancery], obtain the consent of two of the Commissioners of Woods and Forests, and written evidence of such consent must be produced along with the note. The charter is then revised and engrossed as in the ordinary case, but, before being sealed, it is lodged with the Queen's Remembrancer, and transmitted by him for the royal sign-manual and the signatures of three of the Lords of the Treasury.¹(*r*) [Consolidation Act, § 88.]

756. In what respects was the *quæquidem* of a Crown charter of resignation different from that clause in a charter of resignation by a subject-superior?

The *quæquidem* of a Crown charter of resignation must set forth the titles of the last vassal, and state that the lands were resigned upon the date of applying for the charter,²(*s*) such clauses being unnecessary in charters by subjects-superior. [Consolidation Act, Schedule T, No. 2.]

[**757.** What Crown writs are excepted from the abolition of charters and writs by progress, § 4 of the Conveyancing Act, 1874?

Charters of *novodamus*, or precepts or writs from Chancery. The interpretation clause of the Act provides that the word "superior" is to include the Crown, and Prince and Steward of Scotland.]

¹ 10 & 11 Vict. c. 51, § 22.

² 10 & 11 Vict. c. 51, § 17, and Schedule (C), No. 1.

nounced by him are subject to review of the Inner House, and such interlocutors, and also interlocutors of the Inner House, are subject to appeal to the House of Lords (§ 20), probably judgments in regard to Crown charters may be submitted to review, or appealed.

(*r*) The provision of the Act is that the charter shall be transmitted "for the sign-manual of Her Majesty, and the signatures of the Lord High-Treasurer, or of the Commissioners of Her Majesty's Treasury, or any three of them."

(*s*) But "without the necessity of specially setting forth such date."

XI. CONVEYANCES OF SUBJECTS HELD IN BURGAGE TENURE.

758. What is the nature of the tenure of subjects held burgage?

Subjects held in burgage tenure are held by the individual proprietors as vassals immediately of the Crown, for the service of watching and warding, the bailies of the burgh being Her Majesty's bailies or commissioners under the Act 1567, c. 27, for giving infeftment.¹(t)

759. Point out and explain the peculiarities of a disposition of burgage subjects, as contrasted with an ordinary disposition, according to the form in use before the passing of the Titles Act, of subjects held in feu.

Resignation in the hands of the magistrates, as the Crown's bailies, being the only competent method of transmitting burgage subjects, the obligation to infest contained in the disposition was not *a me vel de me*, but "to be holden of Her Majesty in free burgage," and the deed had no precept of sasine, because in the ceremony of infestment (now superseded by the equivalent form of investiture by the town-clerk) the magistrate gave sasine by his own hand. In other respects the clauses of the two dispositions were similar.(u)

760. How was the disponee's title completed before the Infestment Act of 1845?

The disponee's title was completed by a double ceremony, of resignation and infestment, upon the ground of the subjects; the resignation being made in the hands of one of the magistrates, as for the sovereign, by the symbols of staff and baton; and sasine being given by the magistrate, by delivery of the symbols of earth and stone, and hasp and staple. The *res gestæ* were embodied in

¹ Ersk. 2, 4, 9; Menzies Lect. 787 (834).

(t) If a royal burgh is suppressed, the holders of tenements by burgage tenure still continue to hold of the Crown, under a change to blench tenure; Urquhart, 17th Jan. 1758, F.C.

(u) The obligation as to public burdens is "to free and relieve of all cess, annuity, ground-annual, and other public and parochial burdens."

one instrument of resignation and sasine, authenticated by the town-clerk, who had the exclusive privilege of acting as notary in burgage infestments,^(x) and the instrument was recorded in the Burgh Register of Sasines, within sixty days of its date.¹

761. What changes were introduced by the Infestment Act, 1845, and by the Act for the Transference of Burgage Subjects, 1847, in the forms of transmission?

(1.) The Infestment Act dispensed with the notary's docquet in the instrument of resignation and sasine, and declared that the delivery of symbols might be given either on the ground of the subjects or within the council-chamber of the burgh by delivery of a pen.²

(2.) The Act for the Transference of Burgage Subjects dispensed with the ceremony of resignation and infestment, and declared that it should be lawful and competent to resign and obtain infestment in the subjects by presenting the disposition or other warrant to the town-clerk, being a notary, and by his giving sasine by subscribing and recording an instrument in the form annexed to the Act, the instrument being registrable at any time during the life of the party in whose favour it is expedite.^{3(y)} [These

¹ Ersk. 2, 3, 38; Duff's Feud. Conv. 510; Menzies Lect. 788 (835).

² 8 & 9 Vict. c. 35, § 7.

³ 10 & 11 Vict. c. 49, §§ 5, 7.

(x) By the Titles to Land Act, 1860, § 21, it is provided that no town-clerk of any royal or other burgh, appointed subsequent to 8th March, 1860, "shall have any exclusive right or privilege of preparing or expediting any conveyance, instrument, or other writ applicable to land;" but town-clerks who held appointments at that date are entitled, during the period to which such appointments extend, to receive certain fees from parties presenting conveyances for registration.

(y) The 10 & 11 Vict. c. 49 contains provisions as to short forms of clauses in dispositions, &c., and their import, and reference to, instead of insertion of, conditions of entail and real burdens, similar to those in c. 48 of same year, in regard to lands not held burgage. It also provided that witnesses should subscribe only the last page of sasines, and it will be observed (§ 5, and Schedule D) that the notary's motto is required as part of the authentication of the instrument.

By the Titles to Land (Scotland) Act, 1860 (23 & 24 Vict. c. 143), the provisions of the Titles to Land Act, 1858, are generally extended "to titles to land held by burgage tenure," and instruments of resignation and sasine are declared unnecessary, and the title is completed by registration of the convey-

enactments, and those mentioned in the note, were re-enacted by the Consolidation Act, 1868, §§ 7 and 8.]

762. A completed a title to burgage subjects by charter from the Crown and infestment, and B subsequently completed a title to the same subjects by resignation and infestment in the ordinary burgage form ; Which is the preferable title ?

B's title is preferable ; because the magistrates of the burgh, through whose intervention B's title was completed, act as commissioners of the sovereign under an express statute, and thus exclude the ordinary officers of the Crown.¹

763. May burgage subjects be feued ?

(1) The individual proprietors of subjects held in burgage tenure cannot convey the subjects to be held in feu-farm ;² at least a real right cannot be completed under a disposition in that form,

¹ Duff's Feud. Conv. 509 ; C. of Kincardine, M. 6894.

² Bell's Prin. 844 ; Duff's Feud. Conv. 51.

ance with warrant. It is not necessary here to repeat those provisions, but the following points may be noticed :—

1. Where an assignation or assignations of an unrecorded conveyance are written thereon, they do not require to be docqueted with reference to warrant of registration ; §§ 9 and 25, and schedules A and K.

2. The same question arises as under the Act of 1858 as to the competency of recording of new where there is an error in the warrant of registration ; § 18.

3. The reference to real burdens, &c., may be to a recorded conveyance ; § 31.

4. The description of lands may be by reference to recorded deed ; § 34.

5. The provisions of 6 & 7 Will. IV. c. 38, as to erasures in sasines, &c., are extended to instruments under this Act ; § 19.

6. Warrants of registration may be signed by the person on whose behalf the deed is to be recorded, or his agent (§ 3), except in any burgh in which lands are held burgage and no register of sasines is kept, in which case it must, during the subsistence of the rights of the existing town-clerk, be signed by him ; and where no warrant is required, the deed or instrument itself must be subscribed or indorsed by him ; § 22.

7. The provisions of the Act are made applicable to lands in the burgh of Paisley held by the tenure of booking ; § 23.

it being declared by the Act 1567, c. 27, that sasines of burgage subjects, given otherwise than by one of the bailies and by the common clerk, shall be null.^(a) [This point is now set at rest by § 25 of the Conveyancing Act 1874, which provides that proprietors of subjects held burgage are to be entitled to feu them, and provides that such feus granted before the Act are to be valid.]
 (2) But the magistrates may grant feu-rights of land belonging to the burgh to be holden of themselves for an adequate feu-duty.^{1(b)}

¹ Dean, M. 2522 ; Mags. of Selkirk, 11th June, 1828, 6 S. 955.

(a) It is commonly laid down, as here stated, that a proprietor of subjects held burgage cannot sub-feu them (Bankton, 2, 3, 68), but it is not easy to see on what ground. It is said that it changes the tenure, but though A grants a precept to be held of himself, his own tenure remains burgage as before. The Act 1567 does not seem to create any difficulty, because, though under its provisions only a magistrate could act, it applies entirely to sasines by burgage tenure, while in the case supposed, the holding being feu, a magistrate would not be required. Indeed, if this objection be well founded, it would be equally fatal in the case of feus by the magistrates themselves. The only real difficulty is one, not of principle, but of practice. If the superior's heir did not take up the superiority, the vassal's heir could not take the usual course of going to the Crown for an entry, but he could make up a perfectly valid title by special service recorded under 10 & 11 Vict. c. 47, and Titles to Land Act 1858.

(b) The doctrine here stated is laid down by Erskine (2, 4, 9) and other institutional writers, has been confirmed as opinion by judges, and seems to be unquestionable in principle ; but the question does not appear to have been decided in a pure shape. In Dean, cited, the point was as to the magistrates' right to alienate the burgh property, not as to the mode of doing so. In Davie, 2nd June, 1814, F.C., the question was as to the register in which a sasine on a grant by magistrates, bearing to be held feu, should be recorded. In Dawson, 14th Nov. 1827, 6 S. 19, and 4 W. & S. 81, the question was as to the nature of the holding, which was found to be burgage. In this case Lord Balgray said—"I think they" (the magistrates) "have the right to feu and to grant a subaltern right, to be held of themselves, by which they are constituted mid-superiors between the grantee and the Crown." In Mags. of Selkirk, cited, the question was whether there had been a grant of any kind made, and it was found there had not. In Donald's Trs., 11th July, 1839, 1 D. 1249, the point at issue was as to an agent's liability to complete a valid title, and it was held that the one made up was bad, whether the holding was burgage or feu ; and in Fife's Trs., 25th May, 1842, 4 D. 1245, where a grant by magistrates of burgh property in feu was sustained, the judgment was rested on the ground "of a special power contained in the title of the magistrates empowering them to grant such feus."

[764. Is there now any conveyancing distinction between burgage and feudal subjects ?

No ; the Conveyancing Act abolishes the distinction so far as regards conveyances and completion of title. Conveyances may be either in the burgage or feu forms provided by the Consolidation Act. A procuratory or clause of resignation is not to be inserted, or if inserted, it is to be held *pro non scripto*. But writs affecting land held burgage before the Conveyancing Act are to be recorded in the Burgh Register of Sasines, §§ 25 and 26.]

XII. TRUST-DISPOSITION FOR CREDITORS.

765. What are the leading objects of the trust-disposition for creditors ?

(1) The vesting of the estate and effects of the granter in the person of a trustee for behoof of the creditors ; (2) the payment of the granter's debts ; and (3) the discharge of the granter, and the reconveyance to him of any reversion after payment of the debts and the expenses of the trust.

766. Is it necessary, in order to make a trust-deed effectual against future creditors, that the trust-creditors be enumerated in the deed, and the amount of their debts therein specified ? State the reason.

No ; the principle being that the trust-estate is vested in the trustee for behoof of the acceding creditors as a right under reversion ; and it is only upon the reversionary right, after the purposes of the trust have been fulfilled, that future creditors are entitled to rely.^{1(c)}

767. May non-acceding creditors proceed by separate diligence against the trust-estate ; or may the trust-deed be superseded by a sequestration at their instance ?

(1) Where the trust-deed, being a disposition *omnium bonorum* and containing no such conditions or limitations as shall in any

¹ Bell's Com. ii. 385.

(c) It is essential, however, that the debtor be divested, and the trustee vested *habili modo* with the real right to the estate.

way interfere with the beneficial interests of the creditors, has been granted before the commencement of diligence, and the transference has been completed sixty days at least before the granter's notour bankruptcy, the non-acceding creditors cannot disturb the trust by separate diligence.¹ (2) But the trust-deed is no bar to sequestration, which completely supersedes it.²

768. What is the purpose of the deed of accession?

The deed of accession is an instrument executed by the creditors approving of the trust, and acquiescing in the plan of management, disposal, and distribution of the estate set forth in the trust-conveyance; the effect of the deed being to render the conditions binding on them, and to prevent them from taking measures, by diligence or otherwise, for recovery of their debts independently of the trust.

769. Is a creditor, after signing the deed of accession, bound by the trust arrangement, if some of the creditors have refused to concur in the deed?

No; because the deed of accession being a mutual contract, it is an implied condition that the accession shall be general, and that all shall be bound or none.³

770. Is the trustee, who is infert and in possession of the trust-property, personally liable for implement of the truster's obligations to his superior?

Yes; because by taking infertment the trustee adopts the feu, and he cannot refute *invito domino*.⁴

771. Does the conveyance of land to a trustee for creditors make the debts due to them heritable, though originally moveable?

No; unless the trust is so conceived as to vest in the creditors a *pro indiviso* real right in the estate.⁵(d)

¹ Bell's Com. ii. 387.

² Bell's Com. ii. 390.

³ Watson, M. 6397; Bell's Com. ii. 395.

⁴ M. of Abercorn, 16th Dec. 1835,

14 S. 168.

⁵ Ivory's Note on Ersk. 2, 2, 15.

(d) Even then the principle laid down by Erskine in the passage referred

XIII. JUDICIAL TRANSFERENCE.

(1.) *Sequestration.*

772. In what cases may sequestration be awarded ?]

Sequestration may be awarded of the estate of any person in the following cases :—

(1.) In the case of a living debtor, subject to the jurisdiction of the Supreme Courts of Scotland—*1st*, on his own petition, with the concurrence of one creditor whose debt amounts to not less than fifty pounds, or of any two creditors whose debts together amount to not less than seventy pounds, or of any three or more creditors whose debts together amount to not less than one hundred pounds, whether such debts are liquid or illiquid, provided they are not contingent; and *2nd*, on the petition of a creditor or creditors, qualified as above mentioned, provided the debtor be notour bankrupt, and have within a year before the date of the presentation of the petition resided or had a dwelling-house or place of business in Scotland; or otherwise, in the case of a company being notour bankrupt, if it have within such time carried on business in Scotland, and any partner have so resided, or had a dwelling-house, or if the company have had a place of business in Scotland.

(2.) In the case of a deceased debtor, who, at the date of his death, was subject to the jurisdiction of the Supreme Courts of Scotland—*1st*, on the petition of a mandatory, to whom he had granted a mandate to apply for sequestration; and *2nd*, on the petition of a creditor or creditors qualified as before mentioned.¹

773. What persons are declared by statute to be ineligible to the office of trustee ?

(1) The bankrupt; (2) a person conjunct or confident with

¹ 19 & 20 Vict. c. 79, §§ 13, 14.

to must not be overlooked, that "As the nature of the creditor's right cannot be changed without his own consent by the debtor, the creditor must do some deed importing his acceptance of the heritable right offered by him." See also Bell's Com. ii. 5. In any case a sale of the estate would again render the debt moveable.

the bankrupt; (3) one who holds an interest opposed to the general interest of the creditors; and (4) one whose residence is not within the jurisdiction of the Court.¹

774. What is the procedure for vesting the bankrupt's estate in the trustee after his election?

(1.) The trustee lodges with the sheriff-clerk a bond of caution, signed by him and his cautioner (*e*) for the amount of security fixed by the creditors at the meeting for the election of a trustee.

(2.) On the bond of caution being lodged, the sheriff confirms the election, and the sheriff-clerk issues an act and warrant of confirmation, a copy of which is immediately transmitted by the trustee to the Accountant in Bankruptcy, who makes an entry of the name and designation of the trustee in the Register of Sequestrations.²

(3.) The trustee, within twenty-one days after his election is confirmed, causes an abbreviate of his confirmation to be recorded in the Register of Abbreviates of Adjudications.³

775. What is the effect of the act and warrant of confirmation in favour of the trustee?

It *ipso jure* transfers to and vests in him, for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, the whole property of the debtor to the effect following:—

(1.) The whole moveable estate and effects of the bankrupt, wherever situated, so far as attachable for debt, to the same effect as if actual delivery or possession had been obtained, or intimation made at that date, subject to preferable securities existing at the date of the sequestration. (*f*)

(2.) The whole heritable estate in Scotland, to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee,

¹ 19 & 20 Vict. c. 79, § 68.

² *Ibid.* §§ 72, 73.

³ *Ibid.* § 79.

(*e*) If the creditors agree, a bond by a guarantee society may be taken instead of a cautioner; § 72.

(*f*) And not null or reducible.

and recorded at the date of the sequestration, and as if a pointing of the ground had then been executed, subject to preferable securities; provided that such transfer and vesting shall have no effect on the rights of the superior, nor upon any question of succession between the heir and executor of any creditor, nor upon the rights of the creditors of the ancestor (except that the act and warrant shall operate in their favour as complete diligence); and if any part of the bankrupt's estate be held under an entail, or by a title otherwise limited, the right vested in the trustee shall be effectual only to the extent of the interest in the estate which the bankrupt might legally convey, or the creditors attach.

(3.) All real estate in England, Ireland, or in any of the British dominions; provided that, as regards freehold, copyhold, and leasehold estate, the act and warrant be properly registered in the Books of the Court of Bankruptcy for the country in which the property is situated; and likewise that it be enrolled and recorded where, according to the laws of that country, conveyances would require registration or enrolment.¹

776. How may the trustee complete a feudal title to lands in which the bankrupt is publicly infeft?

(1.) By charter of adjudication from the superior, and infeftment or registration of the charter in the Register of Sasines. [Such a charter is not now competent.]

(2.) By disposition from the bankrupt, which he is bound to grant, and infeftment or registration.

(3.) By expeding and recording a notarial instrument in the form of Schedule M, annexed to the Titles Act, setting forth the act and warrant, and specifying the lands, and the title by which they are held by the bankrupt; (g) but as the effect of registration of the instrument is equivalent to infeftment on a conveyance of the lands by the bankrupt, to be holden in the same manner as he held or might have held the same, confirmation by the superior

¹ 19 & 20 Vict. c. 79, § 102.

(g) This provision is now, by the Titles to Land Act, 1860, extended to lands held burgage, which did not previously fall under it. The mode of proceeding and effect are similar to what is here stated. See Act, § 15, and Schedule I.

is necessary, (*h*) the holding implied being *a me.*¹ [See section 25, Consolidation Act, 1868, and Schedules O and LL. See also as to holding now implied, Ans. 700. Confirmation is now unnecessary.]

777. How may the trustee complete a feudal title to lands, the bankrupt's title being an unrecorded conveyance, or if he possessed on apparenecy?

[As the act and warrant of confirmation operates a transference to the trustee of all personal rights and unexecuted warrants, he may complete a feudal title in the same manner as if he held a statutory assignation in any of the methods mentioned in clause (4) of Answer 725. This answer is altered from that in the last edition.]

778. Where the title of the bankrupt's ancestor was an unrecorded conveyance, and the bankrupt himself has made up no title, May the trustee make up a feudal title on a conveyance from the bankrupt without validating the prior securities?

Yes; care being taken to avoid making up a feudal title in the person of the bankrupt himself, by which alone the prior securities can be validated. But before the trustee's title can be completed, whether it be made up by infeftment on the precept in the ancestor's favour, or by notarial instrument, the bankrupt must first be served heir in general, as it is necessary that the service be deduced in the sasine or notarial instrument.² [Service will now be unnecessary. See Conveyancing Act, 1874, § 9, and Mr. Mowbray's remark thereon, Analysis, p. 25.]

779. A trustee, without making up a feudal title, sold lands in which the bankrupt was infeft, and the purchaser registered his disposition in the Register of Sasines; Did he thereby acquire a real right? State the reason.

Yes; it being enacted by the Bankrupt Act that the trustee

¹ 21 & 22 Vict. c. 76, § 22.

² Duff's Feud. Conv. 203, 306.

(*h*) This, under §§ 5 and 22 of the Titles Act, 1858, depended on whether or not the investiture contained a prohibition of subinfeudation or alternative holding. The 5th section of that Act is now explained by § 36 of the Titles Act of 1860, and the result is the same.

may, without making up a feudal title in his person, and without concurrence of the bankrupt, grant conveyances of heritable estate belonging to the bankrupt, with such procuratories, precepts, or other warrants as the bankrupt might competently have granted; which conveyances are declared to be as effectual to the purchaser as if they had been granted by the bankrupt with concurrence of the trustee.¹(n) It is consequently unnecessary for the trustee to make up a feudal title, unless there be a special object in doing so, as for the exclusion of preferable rights.

780. The estates of a person having been sequestrated after his death, and his heir having made up titles to the heritable estate; How may the trustee get the property transferred?

The trustee may apply by petition to the Lord Ordinary on the Bills, praying that such estate shall be transferred to and vested in him; and the Lord Ordinary orders the petition to be served on the heir, and to be answered by him within fourteen days, an abbreviate of the petition and deliverance being recorded in the Register of Inhibitions, which has the effect of an inhibition. If, on the expiration of the *induciae*, no cause is shown to the contrary, the estate is declared to be transferred to and vested in the trustee, as at the date of the sequestration; and the decree (o) is recorded within eight days in the Register of Adjudications.²

781. Where the holder of a bill payable by the bankrupt, with recourse on other parties, has received payment from the bankrupt, in ignorance of the sequestration, and given up the bill; Is he liable to repay to the trustee the amount received?

The holder of the bill is not liable to make repetition; unless the trustee shall replace him in the situation in which he stood, or reimburse him for any loss or damage.³

¹ 19 & 20 Vict. c. 79, § 105.

² *Ibid.* § 106.

³ *Ibid.* § 111.

(n) Held that the provision in this respect in the former Act (2 & 3 Vict. c. 41) applied to the estates of the deceased as well as living bankrupts; Melville, 1st June, 1842, 4 D. 1311. The same rule holds under the existing Act.

(o) An abbreviate of the petition and deliverance.

782. May the trustee sell the heritable estate of the bankrupt by private bargain?

He may do so with concurrence of a majority of the creditors in number and value, and of the heritable creditors, if any, and of the Accountant in Bankruptcy.¹

783. Is it lawful for a creditor, or the trustee, or adjudger selling, to purchase the bankrupt's estate?

When the estate is sold publicly, any creditor (*p*) may purchase; but the trustee, or commissioners, or adjudgers (*r*) selling, are not entitled to purchase.²

(2.) *Adjudication in Implement.*

784. Enumerate and explain the forms of preliminary procedure in use before the passing of the Lands Transference Act, in leading an adjudication against an unentered heir, in implement of his ancestor's obligation.

(1.) *Letters of general charge*,—on which the heir was charged to enter himself as heir to his ancestor; the intention of the charge being to fix the representation of the heir, and consequently to subject him in liability to implement his ancestor's obligation.

(2.) *Action of constitution* against the heir,—proceeding on his ancestor's obligation, and the general charge, and concluding that he should be ordained to make up titles to the lands, and convey them to the oblige.

(3.) *Letters of special charge*,—where the ancestor was infert, on which the heir was charged to enter heir in special to his ancestor, with certification that, upon his failure, the oblige should

¹ 19 & 20 Vict. c. 79, § 115.

² *Ibid.* § 120.

(*p*) Held, under 2 & 3 Vict. c. 41, § 99, which contained a similar provision, that heritable creditor concurring in sale may buy; Cruickshank, 15th Feb. 1849, 11 D. 614.

(*r*) The words "or adjudger selling as aforesaid" in the clause referred to have no application to any part of the Act. They had reference to a clause giving adjudgers power to sell like creditors in bonds and dispositions in security, which was in the bill, but was dropped in the House of Lords. See Kinnear's Law of Bankruptcy, p. 141.

have adjudication and other diligence against him, as charged to enter in special. The effect of the charge was to establish in the heir a fictitious title, equivalent to special service. A *general special charge* was used where the ancestor was not infert.

(4.) *Action of Adjudication in implement*,—founding upon the whole procedure, and concluding that the lands should be adjudged from the heir as charged to enter, and as representing his ancestor upon the passive titles, and that they should be ordained to belong to the pursuer in implement of the obligation.¹

785. What was the change in the procedure where the heir appeared in the action of constitution, and renounced the succession?

Instead of a personal decree against the heir in the action of constitution, decree *cognitionis causa* only was pronounced, which was the warrant for a summons of adjudication in implement *contra hæreditatem jacentem*, without an antecedent special charge.

786. Where adjudication in implement was to be led against an heir unentered, on his own obligation, What was the preliminary procedure?

Where the heir himself was the granter of the obligation, there was no general charge, and no action of constitution, the procedure having commenced, if the ancestor was infert, with a special charge; or, if his title was personal, with a general special charge, which was followed by the summons of adjudication in implement.

787. Enumerate the changes introduced by the Lands Transference Act, and the Titles to Land Act, in the procedure of leading adjudication in implement against an unentered heir.

(1.) By the Lands Transference Act²—

1. General, special, and general-special charges are abolished.
2. The citation upon, and execution of, a summons of constitution are declared equivalent to a general charge, with *induciæ* expiring with the *induciæ* of the summons; and the execution of the summons is declared to infer the same certification.
3. The execution of the summons of adjudication is declared

¹ Menzies Lect. 747 (789).

² 10 & 11 Vict. c. 48, § 16.

equivalent to a special charge, or a general-special charge, as the case may require, the *induciae* expiring at the same time,^(s) and the same certification being inferred.

4. It was provided that the action of constitution and adjudication might be combined, and the decrees of constitution and adjudication contained in one interlocutor.^(t) But if the heir did not renounce, separate actions were necessary.^{1(u)}

(2) By the Titles to Land Act—1st, it was enacted that both actions of constitution and adjudication may be combined in one summons, whether the heir renounced the succession or not; 2nd, the heir's *tempus deliberandi*, formerly a year and day, was restricted to six months.^{2(x)} [These provisions were substantially re-enacted by the Consolidation Act, § 59 *et seq.*]

788. How does a party who has obtained a decree of adjudication in implement against the granter of the obligation, who was publicly infeft, complete a public title to the lands adjudged?

(1) By charter of adjudication and infeftment or registration; or (2) by infeftment on or registration of decree (*y*) and confirmation. [Charters by progress are not now competent.]

789. Where the adjudication has been led against the unentered heir of the granter of the obligation, How does the adjudger complete his title; the granter of the obligation having been publicly infeft?

¹ Browns, 28th Jan. 1851, 13 D. 543.

² 21 & 22 Vict. c. 76, § 27.

(s) With the *induciae* of the summons.

(t) The combination of the constitution and adjudication was known and established in practice before the Act referred to was passed, but could proceed only *contra hereditatem jacentem*. It was, therefore, adopted where it was expected that the heir should appear and renounce, failing which, the decree was limited to one of constitution, upon which the usual proceeding by special charge and adjudication followed. The judgment in Browns' case proceeded on the analogy of the former practice.

(u) The Act here referred to applied only to lands not held burgage, but similar provisions in regard to lands held burgage are contained in the 10 & 11 Vict. c. 49, § 8.

(x) This provision is now extended to lands held burgage; Titles to Land Act, 1860, § 16.

(y) See qualification of this provision of 10 & 11 Vict. c. 48, § 19, in Ans. 789 (2).

(1.) By charter of adjudication and infeftment, or registration.

(2.) It is thought that under the Lands Transference Act only it is not a *habile* method of completing the adjudger's title in this case to take infeftment on the decree; the Act having declared that mode competent only "where the person adjudged from is entered with the superior, or in a situation to charge such superior to grant entry by confirmation."¹ But under the Titles Act, it appears now competent to complete the title by infeftment on or registration of the decree in the Register of Sasines, it being declared by the latter Act that the decree of adjudication shall be equivalent to, and shall have the legal operation and effect of, a conveyance *from the ancestor* of the lands adjudged in favour of the adjudger, to be holden in the same manner as the ancestor held or might have held the same.² But that holding being *a me* only, the superior's confirmation must be obtained.(z) [The matters dealt with in this and the following answer are now regulated by § 62 of the Consolidation Act, as amended by the Conveyancing Act, 1874, § 62. The decree can be recorded or a notarial instrument passed thereon under section 17 of the Consolidation Act. The abolition of charters by progress will be kept in view.]

790. How does the adjudger complete his title where the ancestor's title was an unrecorded disposition?

[Under the Conveyancing Act, § 62, by using the decree for the purpose of infeftment as an assignation, or one of a series of

¹ 10 & 11 Vict. c. 48, § 19. See Liddle, 17th Nov. 1855, 18 D. 61.

² 21 & 22 Vict. c. 76, § 27.

(z) The course suggested in this answer, under the Titles Act, is thought to be competent, as in the subsequent part of § 27 there is express reference to recording either the decree of adjudication or a notarial instrument proceeding thereon in the register of sasines, and in the interpretation clause (§ 36) the word "conveyance" is declared to extend to and include "decrees of adjudication, decrees of sale," &c. By the Titles to Land Act, 1860, § 16, a decree of adjudication of lands held burgage is declared "equivalent to a conveyance from such ancestor of all lands adjudged in favour of the adjudger," and in the interpretation clause (§ 2), which also applies to the Act 1858, the word "conveyance" is declared to include "decrees of adjudication, decrees of sale (whether such decrees of adjudication or decrees of sale contain warrant for infeftment or not)." It is, therefore, competent in this case also to record the decree with warrant of registration. In all cases the nature of the holding will depend on the terms of the investiture; Titles Act, 1860, § 36.

assignments, of an unrecorded conveyance, and completing the title by expediting and recording a notarial instrument in the form of Schedule J, Consolidation Act, or recording the disposition with a notarial instrument in the form of Schedule N. This answer is altered from that in the last edition.]

(3.) *Ranking and Sale.*

791. What are the objects of the process of ranking and sale; and how were these objects formerly accomplished?

(1.) The objects of the process of ranking and sale are—*1st*, the sale of the estate, with adjudication of it to the purchaser; *2nd*, the production by the real creditors of their grounds of debt, to ascertain the order of ranking; and *3rd*, the distribution of the price among the creditors according to their respective rights.

(2.) These objects were formerly accomplished by three separate actions—viz., *1st*, an action of sale; *2nd*, an action of reduction-improbation; and *3rd*, an action of multiplepoinding.¹

792. What must be the qualifications of the pursuer of a ranking and sale?

(1) He must be a creditor holding a real right; and (2) the creditors must be in possession of the debtor's heritable property, either actually, or by decree of mails and duties, or by sequestration of the rents.²

793. Enumerate the leading conclusions of the summons of ranking and sale.

(1) That proof should be taken of the rental and value of the debtor's lands, and that the title should be produced; (2) that the real creditors should be ordained to produce their grounds of debt, diligence, &c.; (3) that the creditors should be ranked upon the rents and price, according to their preferences; (4) that the debtor should be declared bankrupt; (5) that the upset price should be fixed, and the lands sold and adjudged to belong to the highest offerer; (6) that the decree should be declared as valid and effectual as a disposition by the common debtor and the whole creditors; (7) that the purchaser should be infeft, and the superior ordained to grant all necessary charters; and (8) that the creditors

¹ Ersk. 2, 12, 59 *et seq.*; Menzies Lect. 734 (774).

² Bell's Com. ii. 240.

should be ordained to assign their securities to the purchaser to fortify his title.¹

794. Who are called as defenders to the action of ranking and sale ?

The debtor or his apparent heir, and all the real creditors in possession. Personal creditors also are called edictally.²

795. Must the summons include the whole of the debtor's lands ? State the reason.

Yes ; because the debtor's bankruptcy or insolvency is expressly required by statute, and unless the whole of his heritage be brought before the Court, his bankruptcy cannot be proved.³ But it is sufficient, after enumerating all the lands known to the pursuer, to add a general clause of all other heritable estate belonging to the bankrupt, or to which he may succeed.^{4(c)}

796. What is sufficient proof of the debtor's bankruptcy ?

(1) Proof that the interests of the debts and the other annual burdens exceed the yearly income of the lands ; or (2) sequestration of the debtor's estates.⁵

797. If the pursuer or any of the defenders die during the dependence of the action, What is done ?

(1) If the pursuer die, the action is carried on by a judicial factor, or any real creditor, or any creditor who is in a situation to adjudge ;(e) and it is not necessary to call the heir of the deceased pursuer.⁶ (2) If any of the defenders die the heir of the party is called on letters of diligence.⁷

¹ Parker's Styles, 100.

⁵ 54 Geo. III. c. 137, § 7.(d)

² Menzies Lect. 735 (775).

⁶ 54 Geo. III. c. 137, § 10 ; (f)

³ Ersk. 2, 12, 60 ; Macpherson, M. 13363.

A. S., 23rd Nov. 1711, § 4 ; Montgomerie, M. 13323.

⁴ A. S., 17th Jan. 1856, § 12.

⁷ Menzies Lect. 736 (776).

(c) The Act of Sederunt requires this clause to be added.

(d) This Act is repealed by the 19 & 20 Vict. c. 79 ; but similar provisions to those here referred to are contained in the 19 & 20 Vict. c. 91, §§ 3 and 4.

(e) The same course is followed where the pursuer does not insist in the action, or where his interest is extinguished, but a special warrant from the Court is in all cases required ; A. S., 23rd Nov. 1711, § 4.

(f) See note (d).

798. How may the purchaser complete a public title?

(1) By the charter of sale (combined with a confirmation, if the debtor was base infeft) and infeftment or registration; or (2) by infeftment on or registration of decree and confirmation, if the debtor was entered with the superior or had a title capable of being confirmed; (3) if the debtor was not infeft, but had right to an open procuratory or precept, the purchaser may make up a title in virtue of these warrants, either by resignation and infeftment or registration; or by infeftment or notarial instrument, Schedule K or Schedule B (Titles Act), and confirmation.^(h) [The purchaser will now complete his title in the manner mentioned in the additions to Ans. 789 and 790, according as the debtor was infeft or not; Conveyancing Act, § 62.]

^(h) In the case of lands held burgage, (1) by registration; (2) if the debtor was not infeft, and held an open procuratory, 1, by expeding a notarial instrument (Schedule G, Act 1860), and recording deed with warrant of registration and instrument; or, 2, where it is not desired to record the whole of the conveyance, by expeding and recording a notarial instrument in form of Schedule B; 23 & 24 Vict. c. 143, §§ 2 and 10.

PART IV.—SETTLEMENTS, SERVICE, REDEEMABLE RIGHTS, &c.

I. DESTINATIONS.

(1.) *Conjunct Rights to Strangers.*

799. What is the effect of a destination to “A and B, and their heirs,” or to “A and B jointly, and their heirs,” or to “A and B in conjunct fee, and their heirs”?

A and B are proprietors to the extent of one-half *pro indiviso* each, and the share of each descends on his death to his own heir.”¹

800. What is the construction of a destination of heritage to “A and B, and the longest liver of them, and their heirs”?

The survivor has the entire fee, “their heirs” being construed to mean the heirs of the survivor. But during their joint lives each may convey or burden his share; and it is attachable by his creditors.²

801. What is the effect of a destination to “A and B jointly, and, in the event of his survivance, to the said B and his heirs”?

B is sole fiar if he survive; but if he predecease A, the fee is divided betwixt A and the heirs of B.³

802. What is the effect of a destination to “A and B in conjunct fee and liferent, and their heirs”?

¹ Ersk. 3, 8, 35.

² Ersk. 3, 8, 36.

³ Jur. St. i. 112.

A and B are equal fiars during their joint lives, and the survivor has the liferent of the whole unaffected by the predeceaser's debts or deeds. After the survivor's death, the fee divides equally between the heirs of both.¹

803. What is the effect of a destination to A and B jointly, and to the heirs of the said B?

A's right is limited to a bare liferent, and B is sole fiar, whose right cannot be impaired by the acts and deeds of A, whether onerous or gratuitous.²

804. What is the effect of a destination to "A and B, and the longest liver in liferent, for their liferent use allenary, and the heirs of the said A in fee"?

A's heirs are sole fiars, the survivor of A and B having the liferent of the whole, with a fiduciary fee for A's heirs.³

805. Where it is intended to give the survivor of A and B the entire liferent, and the fee unimpaired to his heirs; How may the destination be expressed?

To A and B in conjunct liferent (or to A and B and the survivor in liferent), for their liferent use allenary, and the heirs of the survivor of them in fee.⁴

(2.) *Conjunct Rights to Parents and Children.*

806. What are the general rules for determining the fiar in destinations of feudal subjects in favour of the husband and wife in conjunct fee and liferent, and the heirs to be born of their marriage in fee?

The general rule is, that the husband, being *persona dignior*, is sole fiar. But this rule suffers several limitations founded on the intention of the parties. And (1) the wife is fiar where the property has originally flowed from her or her relations, unless it appears from the deed that it was intended to give the fee to the husband. But where the property is derived from the wife and

¹ Ersk. 3, 8, 35.

⁴ Duff's Feud. Conv. 321; Jur.

² Ersk. 3, 8, 35; Bell's Com. i. 62. St. i. 112.

³ Duff's Feud. Conv. 321.

given as tocher, the husband is *fiar*. (2) Where the property is destined to the wife's assignees, she is *fiar*. (3) The wife is *fiar* where her heirs are more favoured in the destination, as where her heirs are called after the heirs of the marriage. But where there are intermediate substitutes, that spouse is deemed *fiar* whose heirs are first called after the heirs of the marriage.^(a) (4) Where the wife has a power to sell or burden the subjects, the fee is held

(a) In regard to both the second and third rules here stated, it is to be observed, that though they hold generally, yet they will be controlled and overruled by the exception to the first rule in the answer, so as notwithstanding destinations in the terms given, to vest the fee in the husband in every case where the subject assigned is tocher. Erskine (3, 8, 36) has laid down the rule as to the effect of such destinations, that "Where the right is taken to the wife's assignees, the law considers her as *fiar*," for which he refers to the case of *Fead*; and the report of this case (M. 4240) bears that the Lords found the wife to be *fiar*, because the destination "was in favour of her heirs and assignees;" but Elchies, in his Annotations (p. 224), says—"I don't think this has been the true reason of the decision, but only an observation of the collector's, and that the true reason has been that the subject proceeded from the wife's father *ex causa lucrativa*, it being a right to all he should have at his death, and there being a separate tocher besides." This is also in accordance with Gairns, M. 4230, where the wife's father having disposed a tenement in favour of the husband and wife, and "the longest liver of them two in conjunct fee or *liferent*, and the heirs between them, which failing, the said Isobel" (the wife), "her heirs and assignees whomsoever;" it was held that the fee was in the husband; and Gosford states in his report of the case (M. 4232), that "that which moved the Lords was that the tenement was disposed as a tocher to the husband, and so it could not in reason be thought but he and his heirs had the greatest interest." Erskine further says—"A sum of money assigned by the wife in tocher to her husband in conjunct fee and *liferent*, and the bairns of the marriage, whom failing, to the wife's heirs, was adjudged to belong to the wife," for which he quotes Angus, M. 4244, which, as there reported, supports his view; but it appears from Elchies' Decisions that the judgment in this case was the direct reverse. Elchies states (vol. i. No. 1, *voce* "*Fiar*") that "the wife had assigned a bond for 1000 merks to herself and husband in conjunct fee and *liferent*, and the heirs of the marriage, whom failing, to herself, her own heirs, and donators; yet the Lords found that the husband and not the wife, was *fiar* of the sum." See also Creditors of Elliot, M. 4244. The same rule was followed in Henderson, 20th Jan. 1790, M. 4215; affirmed on appeal, 11th May, 1791, where, under a destination by the wife *nomine dotis* in favour of her husband and herself in conjunct fee and *liferent*, and the heirs of the marriage, whom failing, in favour of the wife and her heirs by any subsequent marriage, and after substituting her sisters and their heirs, in favour of the husband, his heirs and assignees, the fee was found to be in the husband.

to be in her. (5) Where the destination is to the husband in liferent alimentary, or liferent allenary, his right is restricted to a liferent, with a fiduciary fee for the children.¹

807. Under a destination to a parent in liferent, and his children *nascituri* in fee ; Who is fiar ?

. The parent is fiar ; on the principle (1) of presumed intention, and (2) that a fee cannot be *in pendente*.²

808. What is the construction of a destination by the husband of his property to himself and his wife "in conjunct fee and liferent, and their heirs" ?

The husband is fiar, the wife having only a liferent, and the words, "their heirs," being construed to mean the heirs of the husband.(b)

809. Under a destination to a husband and wife, and the longest liver of them, and their heirs ; Who is fiar, the wife having survived the husband ?

(1) Where the subject is *heritable*, the fee belongs solely to the wife, to the entire exclusion of the husband's heirs, as if the right had been granted in the same terms to two strangers ; "their heirs" being construed to mean the heirs of the survivor.(c)
(2) Where the subject is *moveable*, the wife and the husband's heirs succeed equally ; there being a presumption for division in destinations of moveables, as these are more easily divided than heritage.³

810. Under a destination of the wife's heritable property to the spouses "in conjunct fee and liferent, for their

¹ Ersk. 3, 8, 36 ; Bell's Prin. 1953
et seq ; Menzies Lect. 650 (683).

² Ersk. 3, 8, 36 ; Bartilmo, M.
4222.

³ Fulton, Jan. 1811, Hume 533.

(b) On the other hand, under a destination of a wife's property to herself and her husband in conjunct fee and liferent, and their heirs, the fee is in the wife.

(c) Under a disposition taken by a husband to himself and his wife in conjunct fee and liferent, and the survivor, and their heirs, assignees, or disponees whomsoever, it was held that the wife, having survived, was sole fiar ; Burrowes, 6th July, 1842, 4 D. 1484. This case may be contrasted with that of Madden, *infra*, p. 379, note 1.

liferent use only, and the children of the marriage in fee, whom failing, the heirs whomsoever of the spouses equally;" To whom does the fee belong; there being no heirs of the marriage, and the wife being survivor?

The fee is untransferred and still in the wife; the destination to heirs whomsoever merely giving them a *spes successionis*.¹

811. The wife's lands were conveyed "to her and her husband, and the longest liver of them two, in conjunct fee and liferent, and to the child or children to be procreated betwixt them, whom failing, to the said longest liver of them two, and the longest liver's heirs and assignees in fee." The husband survived, and was sequestrated, and there were children of the marriage; Was the fee of the lands carried by the husband's sequestration?

The fee was not carried by the husband's sequestration; as it did not vest in him but in the wife, to whom the children are heirs of provision.²(d)

812. Under a destination of heritage by the husband to himself and wife "in conjunct fee and liferent, and to the longest liver of them, and their heirs" (or the heirs of the marriage); Who is fiar; the wife being the survivor?

(1) Where the destination is to the spouses in conjunct fee and liferent, and the longest liver, and *their heirs*, the wife is fiar if she be the survivor, the words "their heirs" being construed to mean the heirs of the survivor.³ (2) But where the destina-

¹ Reid, 4th Dec. 1827, 6 S. 198; Bell's Prin. 1956.

³ M'Gregor, 3rd June, 1831, 9 S. 675; aff. 13th April, 1835; 1 S. &

² Myles, 12th Feb. 1857, 19 D. 408.(d) M'L. 441.

(d) The grounds of the decision in Myles (cited) were—(1) that the property had been the wife's; (2) that the object of the conveyance was to invest her with her separate share of subjects which she had previously held *pro indiviso* with her sister; and (3) that to hold that the husband was intended to take the fee under the "conjunct fee and liferent" was inconsistent with the contingent fee afterwards given to him, failing children.

tion is to the heirs of the marriage, the presumption is against the husband's intention to give a fee to the wife on her survivance.¹(f) [See remarks as to destinations in conjunct fee and liferent ; Smith Cunningham, 7 M'P. 689.]

813. Where it is intended to give the husband a bare liferent, and the fee to the children to be born of the marriage ; How may the destination be expressed ?

To the husband in liferent *allenary*² (or *alimentary*³), and the children of the marriage in fee ; or to trustees for the husband in liferent, and the children of the marriage in fee.⁴

814. Where it is intended to give the wife the fee, the husband a bare liferent, and the children a *spes successionis* ; How may the destination be expressed ?

To the husband and wife in conjunct fee and liferent, for the husband's liferent use *allenary*, and to the heirs of the marriage in fee.

815. What is the construction of a destination to A and B, spouses, in liferent, and C, their son, in fee ?

The fee is in C, and the parents have a liferent only.

816. In whom is the fee, under a destination to A and B, spouses, in liferent, and C, their son, and to any other

¹ Madden, 22nd Feb. 1842, 4 D. 749.(f)

² Newlands, M. 4289.(g)

³ Gerran, M. 4402 ; Douglas, 9th March, 1811, Hume 173.

⁴ Ewan, 10th July, 1828, 6 S. 1125 ; Ross, 22nd June, 1847 (9 D. 1327).

(f) The point here stated was not decided in the case of Madden. In this case the destination, which occurred in a feu-disposition, was to the husband and wife, and the longest liver of them, in conjunct fee and liferent, and to the heirs of the marriage, whom failing, to his and her own nearest and lawful heirs or assignees whomsoever, equally between them in fee. The husband predeceased, and there were no surviving children of the marriage, and thereafter the wife sold the subject, conceiving that by her survivance the whole property had vested in her, and the purchaser having objected to the sufficiency of the title, it was held that she was not sole fiar ; but the question whether she was so to the extent of one-half, though raised was not decided.

(g) See also Watherstone, M. 4297.

children who shall be thereafter procreated equally among them in fee?

The fee is in C, for behoof of himself and of the children afterwards born, if any shall exist.¹

817. Where a sum of money is assigned by the wife in tocher to her husband in conjunct fee and liferent, and the bairns of the marriage, whom failing, to the wife's heirs; Who is fiar?

The husband is fiar; on the principle that whatever is given as tocher is the property of the husband, and here the wife's heirs are only substitutes.

818. Under a destination by a husband to himself and his wife, and the longest liver, in conjunct fee and life rent, for the wife's liferent use allenary, and their son *nominatim* in fee; What are the rights of the husband and son?

The husband is fiar, and the son is only a substitute, it being held that the destination imports a continuance of the fee in the father.^{2(h)}

¹ Dykes, 8rd June, 1813, F.C.

² Wilson, 14th Dec. 1819, F.C.

(h) The point involved in Wilson, cited, had been previously decided in the case of Napier, M. 15418 and 15461, and H. of L., 11th March, 1765; Paton's Appeal Cases, ii. 108. Here the Countess of Findlater executed an entail "in favour of us, the said Countess and the said James, Earl of Findlater, our said husband, and longest liver of us two, in liferent and conjunct fee, and for the said Earl, his liferent use allenary, and to James Livingstone of Bedlormie, and the heirs-male lawfully to be procreated of his body, whom failing, to his other heirs-male," &c. James Livingstone took infeftment on the deed, without service, and sold the lands. In the reduction of a second purchaser's title, the Court found "that a general service was necessary to James Livingstone in order to carry right to the Countess's tailzie, and therefore find that James Livingstone's base infeftment, 1706, and the charter," &c., "proceeding without the said general service, were ineffectual, and did not vest the property of the lands in him." The same judgment was given, Gordon, 23rd Feb. 1791, F.C., where the destination was to the entailer and D. M'Culloch, his only son, and it was found that he required a service, and did not succeed as institute. The reason, however, stated in the answer, though in itself correct, does not apply to Wilson (cited). In that case there was no continuance of the fee in the father, the destination having been in a disposition taken by him.

819. Where it is intended to give the fee to the survivor of the spouses, and to exclude the husband's power of disposal ; How may the destination be expressed ?

To A and B in conjunct liferent, for their liferent use allennarly, and to the survivor of them, and the heirs of the survivor, in fee.

820. What is the effect of a conveyance to a parent in liferent, and his son *nominatim* in fee, the father having power to sell or burden ?

The father is virtually the fiar ; yet on his death the nominal fee in the son becomes absolute, without the necessity of a service.¹(i)

821. What is the construction of a destination to a parent in liferent allennarly, and to his children to be born in fee, with power to the parent (1) to sell and dispoine ; or (2) to burden for provisions to younger children ?

(1) Under the above destination, with power to the parent to sell and dispoine, the parent is fiar ;²(k) (2) but where he has

¹ Wilson, 14th Dec. 1819, F.O. ; ² Ersk. 3, 8, 36 ; Wilson, *supra*.
M'Gowan, 16th Nov. 1822, 2 S. 21 ;
M'Lean, 5 B.S. 444.

(i) The rule is as here stated, and an opinion to the same effect was expressed in Wilson (cited) ; but under the deed referred to in that case (which is the one quoted, *supra*, p. 380, note 2), the father was absolute fiar by the destination, and accordingly it was held that a service by the son was necessary, and for want of it a disposition by him was found ineffectual. In M'Gowan, (cited) the deed conferred a bare liferent, for liferent use allennarly, with power to burden with provisions to younger children ; and M'Lean (cited) relates to an entirely different matter.

(k) A, by contract of marriage, disponed "to himself in liferent, for his liferent use allennarly, and the children or bairns of the marriage" "in fee," but with reserved power, *inter alia*, to sell and dispose of the lands. Infestment followed in favour of A in the above terms, but not in favour of the children *nascituri*. He thereafter granted a trust-deed for behoof of creditors, and in a question between the trustees and the only child of the marriage, who claimed the fee, the trustees were preferred ; but according to the report, "in respect that the sasine taken on the marriage-contract was not so expressed as to divest A of the fee ;" Falconer, 20th Jan. 1825, 3 S. 455. The opinion founded on

power to burden for provisions to younger children only, he has a bare liferent, with a fiduciary fee for the children.¹(*l*) [See Douglas, 8 M'P. 374 ; Snell, 10 M'P. 745.]

822. A fund was destined to A in liferent *allenary*, and to his children in fee, but with power to A, "if he should have(*m*) no children, to bequeath, settle, and dispoⁿe, *mortis causa*," the whole fund. A, who did not exercise the power,(*m*) had two children, one of whom predeceased, and the other survived him ; to whom did the fund belong on A's death ?

The fund belonged to the surviving child, to the exclusion of the heirs of the predeceaser ; because, in consequence of the power of disposal, the fund did not vest in the children during A's lifetime.²

(See Bonds of Provision, Legacies, Service.)

¹ M'Gowan, 16th Nov. 1822, 2 S. 21.

² Robertson, 28th May, 1858, 20 D. 989.

this case was that, though the children are *nascituri*, infestment should be given to them on the deed (the competency of which had been sometimes doubted), otherwise the fee will remain with the granter, subject to his debts and deeds. See More's Notes, pp. 212-213. The effect attributed to such infestment was that, while it divested the father of the fee under the former investiture, it vested him with a fiduciary fee for behoof of the children ; and the principle was fully recognised in Houlditch, 9th June, 1847, 9 D. 1204, though from the way in which sasine was given (being limited to the father's liferent right, without any mention of the fee to the children), the deed was found to be ineffectual against creditors of the father.

(*l*) The law is as here stated ; but under a destination to a parent in liferent and his *children* in fee, any reserved power should be one of division rather than to burden in favour of younger children, because there all the children have an equal right to share in the succession ; Hay, 17th Feb. 1663, M. 12839 ; Kinloch, 21st Jan. 1678, M. 12841. But in the case of M'Gowan (cited) the destination was to the disponent's daughter "in liferent, for her liferent use *allenary*, and after her decease to the heirs of her body in fee," with power to burden, as mentioned in the answer ; and the judgment went on other grounds.

(*m*) In Robertson (cited) the power was contingent on A's "*leaving*" no children, and though its existence suspended the vesting, it could not have been *effectually* exercised.

II. CONTRACT OF MARRIAGE.

(1.) *Legal Rights.*

823. What is the rule of division of a person's moveable estate who has died intestate, leaving a widow and children; or leaving a widow without children; or leaving children, his wife having predeceased him?

(1.) If there be a widow and children, the division is tripartite; a third going to the widow as *jus relictæ*, a third to the children as *legitim*, and a third going also to the children as their father's next of kin, called *dead's part*.

(2.) If there be a widow but no children, the division is bipartite; one-half going to the widow as *jus relictæ*, and the other to the next of kin as *dead's part*.

(3.) If there be children, and the wife have predeceased, the whole goes to the children; one-half being *legitim*, and the other *dead's part*.¹

824. How were the goods in communion divided before the passing of the Intestate Moveable Succession Act, 1855, on the predecease of the wife, if there were issue, or if there were no issue of the marriage; and what alteration on the legal rights of the parties was introduced by that statute?

(1.) If there were children of the marriage, they were entitled to a third of the goods in communion, exigible at their majority, as their mother's next of kin, the other two-thirds remaining with the husband.

(2.) If there were no children, the wife's next of kin were entitled to a half, the other belonging to the husband.²

(3.) By the Intestate Moveable Succession Act it is enacted that "where a wife shall predecease her husband, the next of kin, executors, or other representatives of such wife, whether testate or intestate, shall have no right to any share of the goods in communion, nor shall any legacy, or bequest, or testamentary disposi-

¹ Ersk. 3, 9, 19 *et seq.*; Bell's Prin. 1579 *et seq.*

² Ersk. and Bell's Prin. *ut supra*.

tion thereof by such wife affect or attach to the said goods or any portion thereof."¹

825. What is the rule of division of a person's moveable estate, dying unmarried, and survived by his father and a brother?

The father is entitled to one-half, and the brother to the other.²

826. What is the rule of division of an intestate succession, consisting of moveables, and amounting, after payment of debts, &c., to £1200, the intestate having been predeceased by his father, but survived by his widow, his mother, two brothers, and two nephews, sons of a predeceasing brother?

The intestate's widow is entitled to one-half as *jus relictæ*, being £600; his mother to one-third of the free moveable estate on which the deceased might have tested, being £200; his two brothers to £133, 6s. 8d. each, as the deceased's next of kin; and his two nephews to £66, 13s. 4d. each, as representing their parent, and in right of the share to which he would have been entitled if he had survived the intestate.³ [Turner, 8 M'P. 222.]

827. What is the rule of division of an intestate moveable succession, the deceased having been survived by his widow, a son, and a grandson by a predeceasing son?

The widow is entitled to one-third as *jus relictæ*; the son is entitled to a third as legitim, and to one-half of the remaining third, being dead's part; and the grandchild takes only the other half of the dead's part, as representing his parent; there being no representation in regard to legitim.

828. What is meant by collation?

Collation is the right competent to the heir in heritage, who is also one of the next of kin, to renounce his exclusive right to the heritage, and to insist for an equal share of the whole heritable and moveable succession with the other next of kin.⁴ The right

¹ 18 Vict. c. 23, § 6.

² *Ibid.* § 3.

³ 18 Vict. c. 23, §§ 1, 4.

⁴ Ersk. 3, 9, 3.

is extended by the Intestate Moveable Succession Act to the issue of the predeceasing heir.¹

829. Where a person predeceasing would have been his father's heir in heritage, and the eldest son of such person refuses to collate; Have his brothers and sisters right to any share of the moveable estate of their grandfather?

They have right to a share of their grandfather's moveable estate equal in amount to the excess in value over the value of the heritage of such share of the whole estate heritable and moveable, as their predeceasing parent, had he survived the intestate, would have taken on collation.²

830. What is terce; and from what subjects is it excluded?

Terce is a liferent provided by law to a widow, who has not accepted of a conventional provision, (*m*) of a third part of the husband's heritable estate in which he was feudally vested at the time of his death. It is not due from subjects (1) to which the husband had only a personal right, unless there has been inexcusable delay on his part to complete a feudal title; (*n*) (2) burdens by reservation; (3) superiorities and feu-duties; (*o*) (4) reversions; (5) patronage; (6) minerals; (7) leases; (8) teinds, unless there is infetment of the teinds by erection; (9) subjects held burgage; (*p*) but it is due from tenements within the burgh held feu.³ (*r*)

¹ 18 Vict. c. 23, § 2.

² *Ibid.*

³ Ersk. 2, 9. 44 *et seq.*; Bell's Prin. 1598; More's Notes, 218.

(*m*) Terce may be reserved although there is a conventional provision; and wherever it appears that it was not intended to be excluded, the right subsists.

(*n*) The opposite of this found, Carruthers, M. 2252 and 15846. The report bears (2253) "that it would be too arbitrary to go upon presumption and designs that he lay out, of purpose to deprive her, and it was much safer to hold by the rule," that the husband's sasine is the measure of the terce.

(*o*) Where a husband shortly before his death feued out the greater part of his estate by a single transaction, at a feu-duty greatly exceeding its agricultural rent, it was held that the widow's right of terce did not extend to the feu-duties, but only to the rent of the land unfeued; but considerable doubt was expressed, particularly by Lord Moncreiff; Nisbet, 24th Feb. 1835, 13 S. 517.

(*p*) This is now altered by 24 & 25 Vict. c. 86, § 12, which provides that "the widow of any person who shall, after the passing of this Act, die infet in property held by burgage tenure, shall be entitled to terce therefrom."

(*r*) Terce formerly was due only where the marriage subsisted for a year

831. A party took a conveyance of feudal subjects to himself in liferent, with power to sell and dispone, and to his son and his heirs in fee, and sasine followed accordingly. The son predeceased his father, who afterwards disponed the lands to his grandson; Had the son's widow a terce? State the reason.

No; because the substantial right of fee did not belong to the son at the time of his death, but to his father in virtue of the power to sell and dispone.¹

832. Do burdens by reservation affect the terce?

(1) Terce does not appear to be due out of burdens by reservation in favour of the husband. (2) Real burdens by reservation, in the husband's title, restrict the terce.²

833. An heritable proprietor granted an absolute conveyance, on which infestment followed, but qualified by a personal back-bond; Was his widow's terce thereby excluded?

The sums covered by the security will diminish *pro tanto* the amount of the terce, but it will not be excluded as to the reversion.³(t)

834. Where the husband's infestment is liable to be set aside

¹ Cumming, M. 15854.

² Bell's Prin. 1598, 1600.

³ Bartlet, 21st Feb. 1811, and 27th Nov. 1812, F.C.(s)

and day or produced a living child; but by 18 Vict. c. 23, § 7, it is enacted that "Where a marriage shall be dissolved before the lapse of a year and day from its date by the death of one of the spouses, the whole rights of the survivor, and of the representatives of the predeceaser, shall be the same as if the marriage had subsisted for the period aforesaid." These terms seem broad enough to include the right of terce, unless, as is probably the case, they are to be restricted by the object of the Act, which is, "To alter the law of intestate *moveable* succession."

(s) In Bartlet the question was raised whether, the lands having been sold, the widow was entitled to a third of the amount of the rents, or of the interest on the price; but the judgment is not reported.

(t) Sums advanced, though after the date of the backbond, will diminish the terce; Bartlet, *supra*, note 1.

on the ground of informality, Will it be sufficient to support the widow's claim to terce in a question with the heir? State the reason.

Yes; the reason being that, as the husband could not have objected to the invalidity of his own sasine, no such objection is competent to his heir.¹

835. How may terce be excluded?

(1) By the wife's acceptance of a conventional provision, or by renunciation in an antenuptial marriage-contract; (2) by all *bona fide* transferences of the fee, feudally completed before the husband's death; (3) by an express clause in a deed of entail.²(x) [Hay Newton, 8 M'P., H. of L. 66.]

836. What are the measures for making the terce effectual?

(1) Service to the terce, which gives the widow a right of possession *pro indiviso*; and (2) kenning, by which the subjects are divided between the widow and the heir, and the former acquires a proper right of liferent in her third.³

837. What is lesser terce?

Lesser terce is that which is due out of lands already burdened with a prior terce, and consists of a third of the remaining two-thirds of the rents, to be increased to the full extent on the death of the first tercer.⁴

838. What is the right of courtesy; and on what contingencies does it depend?

Courtesy is a husband's right of liferent of his wife's heritable estate after her death. It depends on these contingencies:—(1) that there shall have been a child born of the marriage, heard to

¹ Rose, M. App. "Terce," No. 1.(u)

³ Ersk. 2, 9, 50.

⁴ Ersk. 2, 9, 47.

² Bell's Prin. 1600; Duff's Feud. Conv. 406.

(u) *Observe*—This case is No. 1 of *Part I.* of the Appendix, as there is an error in the printing in the Dictionary.

(x) So found, Gibson, M. 14869.

cry ; (2) that the child shall be the wife's heir ; (y) (3) that the subjects shall have been acquired by the wife by succession, as heir of line, tailzie, or provision ; (z) (4) that the wife shall have been feudally vested at the time of her death.¹(a) [Courtesy extends— (1) to lands in which the wife died infeft as heiress of entail in possession, unless expressly excluded by the entail ; (2) to burgage subjects ; (3) to superiorities ; (4) but not to lands held by trustees for behoof of the wife ; Lord Clinton, 8 M'P. 370.]

839. Do arrears of terce or courtesy transmit to heirs ?

(1) If the widow has been served to her terce, arrears transmit to her representatives. It has been held that, without service, arrears do not transmit;² but the decision is thought to be of doubtful authority.³(b) (2) Arrears of courtesy are not demandable by the husband's heir.⁴

(2.) *Conventional Provisions.*

840. What are the leading objects of the antenuptial contract of marriage ?

The settlement of provisions to the wife and children ; the securing of these provisions against the consequences of the

¹ Ersk. 2, 9, 52 ; Bell's Prin. 1605.

⁴ Ersk. 2, 9, 55 ; Macaulay, M.

² M'Leish, 2nd Feb. 1826, 4 S. 485. 3112.

³ More's Notes, 218.

(y) Or, if dead, would have been her heir had he survived. It is not due to a second husband if there be an heir of the first marriage ; Darleith, M. 8118.

(z) Courtesy is due where, though the wife takes the lands as dispositive, she was *alioquin successura* ; Primrose, M. voce "Courtesy," App. No. 1.

(a) Courtesy is not excluded in respect of alleged nullities in wife's sasine, the same "not having been quarrelled in her lifetime ;" Hamilton, M. 3117. It was in one case held not to be due from burgage subjects ; Gordon, M. 3116 ; but Erskine (2, 9, 54) denies this, and says the ground of the judgment was that the subject had been acquired *titulo singulari*. Courtesy differs from terce in this respect, that while terce is diminished only by debts and burdens completed by infeftment, courtesy is accompanied by a general liability to that extent for all the wife's debts, but with relief against the executor for such of them as are personal ; Monteith, M. 3117 ; Bell, i. 60 ; More's Notes, 219.

(b) The principle of the decision in M'Leish, cited, is laid down, Stair 2, 6, 13, 14, and 15 ; and Ersk. 2, 9, 50.

husband's insolvency; the limitation of the legal rights of the wife and children; and the disposal of the wife's property.

841. Where the husband has bound himself for an annuity to the wife, payable after his death, What is the effect of the provision on the husband's bankruptcy?

Such an obligation confers on the wife a *jus crediti*, and she is entitled to be ranked upon her husband's estate, and to draw a dividend corresponding to the value of the contingent annuity.¹(c)

842. Where a fund has been conveyed in the contract; for behoof of the wife, exclusive of the *jus mariti*; Does that assignation require to be intimated, to exclude the husband's creditors?

Such an assignation does not require to be intimated to exclude the husband's creditors; because they are not entitled to rely on their debtor having married without a contract, and so to have acquired the common law rights of a husband over his wife's fortune.²(d)

843. Where bank shares are bought with the wife's funds, and the transfer taken to her husband and herself; Can the bank retain the shares for a debt due by the husband?

No; because the investment of the wife's funds in the joint names of the husband and wife is notice to the bank that she has a separate and independent interest, and that the fund is not the absolute property of the husband.³

¹ Menzies Lect. 429 (445).

³ Gairdners, 22nd June, 1815, F.C.

² Rollo, 28th Nov. 1832, 11 S. 132.

(c) If there is a sequestration, the valuation is made by the sheriff or trustee; 19 & 20 Vict. c. 79, § 54.

(d) An opinion to the effect here stated was expressed in Rollo (cited), and where, as was there the case, the conveyance is by the wife, the principle is plain enough; but if the conveyance were by the husband, the result would probably be different. The real question, however, was as to the import of the destination in the contract, which was substantially the same as that in Watherstone (*supra*, note (g), p. 379), and it was held that the husband had a mere liferent. The conveyance was to the wife herself and her husband, and was practically a trust for themselves and their children. Any intimation to the husband's creditors, which is what they contended for, seems hardly intelligible.

844. Where furniture, belonging to the wife, has been settled by antenuptial contract for her behoof; May it be poinded for the husband's debts?

(1) Furniture in the possession of the husband, though settled by the contract for the wife's behoof, may be poinded for the husband's debts; because all moveables are presumed to belong to the husband; (2) where the *jus mariti* is excluded, and the furniture is inventoried with reference to the contract, the husband's creditors are excluded; the furniture in this case being distinct and separate from the husband's property.¹(e) (3) Where a house, and the furniture contained in it, had been conveyed by a stranger to an unmarried woman, exclusive of the *jus mariti* of any husband she might marry, and the husband whom she married having come to reside in the house, it was held that the furniture was not attachable by his creditors.²(f)

845. Where a special fund belonging to the wife has been conveyed in the contract to the husband; May retention of it be maintained in implement of the obligations in her favour?

Retention may be maintained where the fund has been specially destined to form a security for the wife's provisions, or has been

¹ Macdonald, M. 5848.

² Young, 26th June, 1855, 17 D. 998.

(c) In the case of Macdonald, cited, there was no inventory, the conveyance was to trustees, who, however, never took possession, and the furniture was found liable for the husband's debts. In Campbell, 13th June, 1848, 10 D. 1280, and Brown, 19th Dec. 1850, 13 D. 373, there were inventories, but the contracts were held to be mere devices to protect the furniture against the husband's creditors while securing to him the full benefit of it, and the deeds were found ineffectual. Beyond affording facility in proving the identity of the articles, which (see Young, *supra*, note 2) must be done in every case, there is no advantage in having an inventory. The only rule that can be laid down seems to be, that in order to make a settlement of furniture on a wife effectual, she must be put, or left, in the position of being entitled absolutely to dispose of it at her own pleasure, uncontrolled by her husband, or the settlement must be made through the intervention of a trust with the same absolute power.

(f) The exclusion, however, though effectual against the husband's creditors, does not put it beyond the power of the wife to convey to the husband; *per* Lord Curriehill and Deas in Napier, 18th Nov. 1864, 3 M'P. 57.

conveyed under an obligation to lay it out for her behoof.¹ But it is otherwise where the conveyance is absolute.²

846. Where the tocher has not been paid ; Is the husband bound to implement the wife's provisions ?

Yes ; because the marriage itself, and not the tocher, is the chief consideration for the provisions settled by the husband on the wife.³(*h*)

847. A sum which was destined in a marriage-contract to the wife, in case of no child of the marriage surviving the husband, or in the event of all the children dying before majority, was assigned by the wife during the life of children of the marriage, all of whom died before majority ; Was the fund effectually assigned, the wife having predeceased the survivor of the children ?

Yes ; because this destination does not import a conditional institution of the wife, but is a contingent debt, assignable by the wife, and due to her assignee after her own death, on the condition being purified.⁴

848. What is embraced under a provision of conquest ?

Everything acquired during the marriage by industry, economy, purchase, or donation, after deducting debts. But it does not include what the husband succeeds to as executor,⁽ⁱ⁾ or what he acquires by legacy or by his *jus mariti*.⁵(*k*)

849. Does a provision of conquest of lands, annualrents, goods, and gear, include bonds for sums of money ?

Such a provision does not embrace bonds, unless it can be

¹ Haddington Manufactory, M. 9144.

² Greenhill, 24th June, 1824, 3 S. 169.(*g*)

³ Wightman, M. 9201.

⁴ Ersk. 3, 9, 9 ; Burden, Cr. and St. 214.

⁵ Ersk. 3, 8, 43.

(*g*) See also Boswell, 4th Feb. 1846, 8 D. 430, where it was observed, *per* Lord Fullerton, "that the rule so broadly laid down by Erskine" (3, 3, 86) "cannot now be received without a most important limitation."

(*h*) Unless the words of the contract bear that the tocher was the consideration ; Wightman (cited).

(*i*) Heir or executor.

(*k*) See also Diggins, 7th March, 1865, 3 M'P. 609.

shown that they were granted for sums or moveables acquired during the marriage.¹

850. How may the wife's provisions be made preferable to the claims of the husband's creditors?

(1) By prior diligence; (2) by a conveyance in security; (3) by a separate investment in trust; (4) by the exclusion in the marriage-contract of the *jus mariti* and right of administration, the fund being clearly distinguished and separate; (5) by declaring the provisions to be alimentary.²(l)

851. Does the acceptance of conventional provisions by a wife, after her husband's death, discharge her legal claims?

(1) Acceptance of conventional provisions by a wife discharges her right to terce;³ but it does not, in the general case, discharge her *jus relictæ*.⁴ (2) Where the provision is declared to be in satisfaction of the *jus relictæ*, or is contained in a mutual settlement of the whole estate, heritable and moveable, the wife's acceptance of the provision will discharge her legal claim.⁵ But it has been held that a discharge of the *jus relictæ* was not implied by the wife's acceptance of the liferent of her husband's whole estate under a deed to which she was not a party.⁶(n) (3) Ac-

¹ Robson, M. 8050; Ersk. 3, 3, 30; Ivory's Note.

May, 1821, 1 S. 18; Fraser, 17th Dec. 1835, 14 S. 174.(m)

² Duff on Deeds, 181; Menzies Lect. 430 (445).

⁵ Riddell, M. 6457; Duff on Deeds, 137.

³ 1681, c. 10; Ersk. 3, 9, 16.

⁶ Thomson, 8th Dec. 1849, 12 D.

⁴ Ersk. 3, 9, 16; Howden, 18th

276.(n)

(l) The case here contemplated is that of a provision payable as an alimentary allowance during the husband's lifetime, which will give the wife a *jus crediti*, but *not per se a preference*.

(m) Fraser's case was in regard to rights of children, not of wife, and referred to an antenuptial contract of marriage.

(n) In Thomson's case, which was at the instance of the wife's representatives, the question here stated was raised, but not decided, the claim having been held barred by taciturnity. In reference to marriage-contract provisions, Erskine (3, 3, 30) lays down the opposite rule, adding, "for it is presumed that the liferent of the whole was granted in full satisfaction of her *jus relictæ*, and that the husband had no intention to give her both the property of that share to which she is entitled by law and the liferent of the rest" (see Young and

ceptance of conventional provisions will not imply a discharge of the wife's legal claims, if she is in ignorance of her legal rights, or of the true state of the husband's affairs.¹

852. What is the effect of a discharge by a child of his legitim during his father's life, or after his death, as regards the other children and their father's general disponent?

(1) A renunciation of legitim by a child, *during his father's life*, has the effect of increasing the legitim fund(*p*) falling to the children who have not renounced, in the same way as if the renouncer had died before the father.² (2) But where a child renounces or discharges his legitim after his father's death, such discharge operates, not in favour of the children claiming legitim, but in favour of the general disponent; because legitim vests on the death of the father, and the shares of the children, claiming their legal rights, had become fixed before the child accepting the conventional provision (in consideration of which he discharged his legal claims) had exercised his option.³

853. How may a *jus crediti* be conferred on the children for their provisions?

¹ Hope, 17th Dec. 1833, 12 S. 222; ² Ersk. 3, 9, 23; Hog, M. 8193; (*r*)
 Ross, 3rd Feb. 1843, 5 D. 483; Panmure, 28th Feb. 1856, 18 D. 703.
 Landells, 2nd March, 1854, 16 D. ³ Fisher, 16th June, 1840, 2 D.
 715.(*o*) 1121.

other cases, M. 6447 *et seq.*). The presumption here referred to, though it seems equally applicable to *mortis causa* provisions, does not in that case *exclude* the *jus relictæ*, but there the principle of approbate and reprobate comes into operation. See Leighton, 1st Dec. 1852, 15 D. 126.

Mortis causa provisions are "not inconsistent with, but corroborative of, the *jus relictæ*," and the widow's acceptance of them after her husband's death does not make a bipartite division of the estate; Campbell's Trs., 15th July, 1862, 24 D. 1321. See also Henderson, M. 8187. There is an opposite judgment, Andrews, 2nd March, 1836, 14 S. 589; but it was overruled in Fisher, 16th June, 1840, 2 D. 1121, and Campbell's Trs., *supra*.

(*o*) See also Keith's Trs., 17th July, 1857, 19 D. 1040; Douglas, 30th June, 1859, 21 D. 1066.

(*p*) Or rather "the share of the legitim" falling to them; its amount is in every case either a half or a third.

(*r*) Affirmed 7th May, 1792, 3 Pat. App. 247.

(1.) The provisions must take effect, or be capable of taking effect, during the father's life;—as where they are payable at a term certain, or any other period which may arrive during the father's life; or where they bear interest from such term or period; or

(2.) The provisions must be of such a nature as to place the father under restraint;—as where he is taken bound not to contract debt to the prejudice of the children's provisions; or

(3.) They must be of such a nature as, when duly carried out, the father will be divested;—as a conveyance of a particular subject to himself in liferent allenary, and the children in fee; or a conveyance to trustees for behoof of himself in liferent, and the children in fee; or an obligation to give the children infestment in a particular subject *de presenti*, or at a fixed period which may arrive during the father's lifetime.¹

854. How may a preference be conferred on the children for their provisions in competition with the father's creditors?

(1) By divesting the father of the fee by infestment where the provisions consist of heritage; (2) by a separate investment in trust; (3) by preferable diligence in security of provisions, under which the children have a *jus crediti*.²

855. Does the acceptance by a child of a conventional provision exclude his legitim?

(1) When the provision is a special bequest, the presumption is in favour of the child having right to it over and above the legal provision, since otherwise the bequest would be inoperative.³

(2) If the provision is contained in a settlement of the father's whole estate, heritable and moveable, the child is not entitled both to the provision and to legitim, for if he accept the one, he is held

¹ Ersk. 3, 8, 40; Bell's Prin. 1985; Duff's Feud. Conv. 419; Menzies Lect. 646 (679).

² Ersk. and Bell, *supra*.

³ Ersk. 3, 9, 23; Howden, 18th May, 1821, 1 S. 18; Smith, 10th June, 1829, 7 S. 734; Macdowal, 10th July, 1833, 11 S. 952; Fraser, 17th Dec. 1835, 14 S. 174.

to have abandoned the other.¹(t) (3) The legitim will be discharged where the provision accepted has a condition annexed that it shall be in full satisfaction of legitim.² (4) Acceptance will not imply discharge if the child is in ignorance of his legal rights, and of the true state of his father's affairs³(u) [Kippen, 1 R. 1171].

856. A father granted a provision to his daughter in liferent allenary, and to her children in fee, declaring the same to be in lieu of legitim. The daughter repudiated the provision, and claimed legitim; Was the right of her children to the fee excluded?

¹ Henderson, M. 8191; Collier, 6th July, 1833, 11 S. 912. See Stevenson, 7th Dec. 1838.(s)

² Macgill, M. 8179; Campbell, M. 8187; Begg, M. 12851.

³ Landells, 2nd March, 1854, 16 D. 715.

(s) Reported, 1 D. 181.

(t) The rule is not quite accurately stated here. In Howden (cited, page 394, note 8) the settlement was of the father's whole estate, but it was held that legitim was not excluded. The principle seems to be, that where the settlement is one for distribution of the whole estate *among the children*, any one of them taking legitim must give up his provision under the deed.

(u) The case of Landells (or Selkirk) referred to a widow, but the point here stated will be found in Panmure, 21st Nov. 1854, 17 D. 85; Keith's Tra., 17th July, 1857, 19 D. 1040. See also Douglas, 30th June, 1859, 21 D. 1066.

The election cannot be delayed to see the result of contingencies, but must be made so soon as the necessary information as to the estate is got; Keith's Tra., *supra*; unless prevented by necessary cause, such as minority. A, by trust-disposition and settlement, conveyed his whole estate, which, so far as personal, was about £5000, to trustees for behoof of his spouse in liferent, under burden of the maintenance and education of the children of their marriage, and for behoof the children in fee, equally among them, the shares of such children not to vest till the death of their mother. He died, survived by his wife and two children. The trustees were named tutors and curators to the children, but never acted in that capacity, and never made up inventories in terms of the Act 1672, c. 2. They paid to the widow the whole annual income, and she maintained and educated the children, one of whom died at the age of seven, and the other at the age of nineteen, after having married, on which occasion the mother settled, during her own lifetime, on her daughter and her husband, and their children successively, an annuity of £200. Held, after the daughter's death, that the representatives of her and her brother were entitled to claim legitim, and that the daughter and her husband did not, by acceptance of the marriage-contract provision, homologate the father's settlement, they being at the time ignorant of their legal rights; Paterson, &c. (Ritchie's Tra.), 15th May, 1866, 4 M'P. 706.

No ; it having been held that the repudiation of a liferent provision granted to a parent does not affect the right of his children to the fee.¹(y) [Jack, 6 R. 543.]

857. What is an infeftment in locality ; and what is the form of the deed by which it is constituted ?

Locality is the apportionment of certain lands to the wife after her husband's death, for her liferent use, under which, when completed, she obtains a real and perfect right of liferent, not restrictable by a subsequent diminution of the yearly value of the remainder of the estate. It is constituted by an obligation in the contract, or separately, by which the husband provides and disposes the lands to the wife in liferent (or binds himself to infeft the wife in liferent) after his decease, to be holden *de se*, but subject to a proportional part of the public burdens ;² and it is completed by infeftment, or by registration of the deed, with a warrant of registration thereon, in the Register of Sasines.

858. When it is desired to make the wife's provision by locality of a definite amount ; How may this be accomplished ?

(1) By introducing a clause making the wife accountable to the heir for the surplus of the rents of the locality lands above a certain fixed annuity ; or (2) by binding the wife to grant a tack of the locality lands to the heir at a fixed rent ;³ or (3) by specify-

¹ Fisher, 24th Nov. 1831, 10 S. 55 ; Collier, 6th July, 1833, 11 S. 912.(x)

² Jur. St. i 199.

³ *Ibid.* i. 200.

(x) Harvey's Tra., 30th Jan. 1863, 1 M'P. 345, may also be referred to.

(y) Subject to any diminution occasioned by the parent taking legitim. The children's right emerges on the death of the parent, and the liferent interest falls not into residue, but to the parties whose beneficial interest is diminished by the election ; Sinclair's Exrs., 11th Dec. 1852, 15 D. 212.

A conveyed his estate to trustees for payment of the annual income to his widow, and after her decease to B, his only child, during her lifetime, exclusive of the *jus mariti*, declaring the provision to be in full of all her legal claims, and on the termination of the liferents to make over the trust-estate to his own nearest heirs, or to any person or persons to whom he should destine the same by any writing. He executed no such writing, and after his death B and her husband claimed legitim. Held, on the death of the widow, who also had a power of disposal under the deed, which she did not exercise, that the fee of the estate was vested in B ; Balderston, 23rd Jan. 1857, 19 D. 293.

ing a minimum annual rent of the locality lands, and binding the heir to make up the amount when the rental sinks below it.(z)

859. Where lands have been conveyed by antenuptial contract to the father in liferent, and the heirs of the marriage in fee, whom failing, the heirs whomsoever of the father; What is the effect of alienations by the father in a question with the heir of the marriage, or with the heirs whomsoever?

(1) Gratuitous alienations are reducible at the instance of the heir of the marriage, as *contra fidem tabularum nuptialium*, the father being under an implied obligation not to defeat the destination in the marriage-contract by a gratuitous deed.¹(a) Onerous alienations are effectual;² but if the father sell the lands, the heir is entitled to indemnification from his separate estate or funds, at his death, to the amount of the price received.³(c) (2) The destination being gratuitous as regards substitutes called after the heirs of the marriage, all alienations by the father, whether onerous or gratuitous, are unchallengeable by the heirs whomsoever.⁴

860. May the father be restrained by inhibition from making alienations prejudicial to the rights of the children under the marriage-contract?

(1) Where the children have a *jus crediti*—as where the provision is payable during their father's life,(d) or where the father

¹ Graham, M. 13010; Ewen, 15th Jan. 1824, 2 S. 612.

² Ersk. 3, 8, 39.

³ Bell's Prin. 1987; E. of Wemyss, 28th Feb. 1815, F.C.; aff.(b)

⁴ Ersk. 3, 8, 39; Craik, 4313.

(z) The first of these plans would not meet the case of the rents falling below the annuity, and the third would not meet that of their rising above the minimum, but a combination of the two would serve these purposes. The efficacy of the second might depend on the heir's willingness to take a lease at the rent named.

(a) It may be observed that in Graham the destination to the husband was not in liferent, and in Ewen there was no destination, but an obligation by the husband in favour of the children; but the rule is correctly stated.

(b) 6 Pat. 390.

(c) The claim is limited as here stated, and does not extend to the value of the estate when the succession opens.

If the father should burden the estate with debt, the heir would have a claim of relief against his separate estate; Cunningham, 20th Dec. 1810, F.C.

(d) Care must be taken in framing the provision to secure this effect. In

is bound to infeft the children at a particular term, or is bound not to contract debt so as to defeat the provisions—they may protect themselves by inhibition; because they are proper creditors of the father, and as such are entitled to use all competent diligence.¹ (2) But where they have merely a *spes successionis*—as where the provision is not payable till after the father's death,^(c) or the lands are destined in general terms to the heirs of the marriage—inhibition is ineffectual; for although that diligence is effectual to secure a valid obligation, it cannot extend or make valid an imperfect obligation.²

861. Where lands are disposed to a parent in liferent allanarly, and the heirs of the marriage in fee; How may a real right, under the destination, be completed?

(1.) Where the conveyance contains a precept of sasine, by infeftment in the precise terms of the destination, to the parent in liferent allanarly, and the heirs of the marriage in fee.³(f)

(2.) By expeding and recording a notarial instrument under the Titles to Land Act, Schedule B or Schedule K (g) in terms of the destination. [Now the Consolidation Act, 1868, Schedule J.]

(3.) By recording the conveyance in the Register of Sasines, with a warrant of registration on behalf of the parent in liferent allanarly and the heirs of the marriage in fee, to be signed by the parent (h) on behalf of himself and for the heirs of the marriage.

¹ Ersk. 8, 8, 40; Douglas, M. 12910.

² Ersk. 8, 8, 39; Gordon, M. 4398.

³ Newland's Cra., M. 4289; Houlditch, 9th June, 1847, 9 D. 1204; Barstow, 18th Feb. 1858, 20 D. 612.(f)

one case, though the provisions were made actually payable at majority or marriage, the children were unable to compete with the father's creditors, because they were so expressed as to prevent their proceeding against him; Children of M'Tavish, 18th Nov. 1787, M. 12922.

(c) But in this case, if it is made to bear interest from marriage or majority, it will be effectual; Cra. of Mackenzie, 2nd Feb. 1792, M. 12924.

(f) In Barstow, sasine was given to the wife for herself and children, though the precept was as here stated.

(g) Schedule K, being applicable only to parties acquiring right to unrecorded conveyances, would not be appropriate here.

(h) A warrant signed by the parent would probably be inept. He would at all events require to represent himself as agent, which may perhaps not be within the meaning of "agent" in the Act and Schedule; but there seems to be no difference in principle between a person acting as agent in the sense of

The competency of the last method, however, is doubtful, as the Titles Act requires the subscription of the person on whose behalf the deed is presented for registration, or of his agent; a requirement which, of course, cannot be satisfied in the case of heirs *nascituri*.

862. A, infeft in lands, conveyed them in his antenuptial contract to himself in liferent allenary, and to the heirs of the marriage in fee, and sasine followed in favour of A in liferent allenary; A having become bankrupt, what right had his trustee in the lands?

The trustee had right to the fee, as it remained vested in A by the original title, the conveyance in the marriage-contract having been feudalised only to the extent of a bare liferent in A.¹(i)

863. Lands were conveyed by antenuptial contract to a parent in liferent, and the heirs of the marriage in fee, and infeftment followed accordingly in favour of the parent and the heirs of the marriage; Was the fee attachable by the parent's creditors?

Yes; because under the destination the parent is *fiar*, the heirs of the marriage having merely a *spes successionis*; and as infeftment does not amplify the children's right, it can give them no preference which is not theirs by the destination.²

864. What is the construction of destinations in marriage-contracts to "heirs and children of the marriage," and "bairns and children of the marriage"?

(1.) Under a destination to "heirs and children of the marriage," the eldest son takes the heritage, and the moveables are divided equally among the younger children.³(k) But an excep-

¹ Newland's Cra. and Houlditch, *supra*, p. 398, note 3.

² Macdounal, M. 12844; Fairservice, M. 2317.

³ Fulton, Jan. 1811, Hume, 533.

the Act for children *nascituris*, and an attorney receiving sasine for them, so that there would not be the same objection to an agent signing the warrant, though, as it would probably not be desired to record the whole deed, a notarial instrument would be the most convenient form.

(i) The same principle had been recognised in Graham's Cra., 4th July, 1759, M. 6931. See also Dundas, 23rd Jan. 1823, 2 S. 145.

(k) The rule is as here stated, but the settlement was in Macdounal, cited, altogether of moveables, and in Fairservice altogether of heritage. In a prior

tion obtains in the case of burgage subjects of small value, where the destination is held to import an equal interest to all the children.¹(l)

(2.) Under a destination to the "bairns and children of the marriage," the whole children are entitled to succeed equally.²

(3.) It is said that a provision of *conquest* to "heirs and bairns," imports an equal right in all the children;³ but neither Professor G. J. Bell⁴ nor Professor Menzies⁵ recognises the distinction.

865. The fee of the conquest having been settled upon "the children of the marriage," with a power of division to the father, and the titles of an estate subsequently acquired having been taken to the father, and his heirs and assignees; Was the eldest son entitled to the estate, to the exclusion of the younger children? State the reason.

No; because a destination to children of the marriage imports an equal right to the whole, and the taking of the titles of the estate to the father, and his heirs and assignees is not held by implication to be an exercise of the power of division in favour of the heir at law.⁶

¹ Watson, M. 985.

² Carnegie, M. 12840; Jardine, 22nd Jan. 1850, 12 D. 504.

³ Duff's Feud. Conv. 413; Allardice, 12th Feb. 1721, Rob. App. 399; Rankin, M. 14931.

⁴ Bell's Prin. 1977.

⁵ Menzies Lect. 656 (689).

⁶ Wilsons, 14th June, 1811, Hume, 584.(m)

case, Wilsons, M. 12845, a settlement of lands, money, and conquest on "the heirs and bairns" of the marriage was held to give an equal right to all the children; but the deed contained a declaration "that the provisions above written, conceived in favour of the said children, shall be divided and proportioned among them as the said Andrew Wilson shall think fit."

(l) This rule seems to apply only to tenements, and not to lands held burgage; Dollar, 4th Dec. 1792, F.C., M. 13008. Here lands so held, and worth from about £70 to £100 of yearly rent, were in a son's marriage-contract disposed by his father "to him and his wife in liferent, and to the heirs or children, one or more, lawfully to be procreate of the marriage, in fee (as shall be disposed of by the father to them)." The father afterwards disposed the whole to the eldest son, and the disposition was sustained in a question with the other children, but in the procuratory the words "or children" were omitted, and the ground of judgment which reversed that of the Lord Ordinary does not appear.

(m) See also Jardine, *supra*, note 2.

866. Lands were conveyed by antenuptial contract to the spouses in conjunct fee and liferent, and the heirs of the marriage *nascituri*; and the father granted a gratuitous conveyance of the lands to his eldest son as the heir of the marriage, his heirs and assignees; Was the conveyance effectual to exclude the second son as heir of the marriage at his father's death, the eldest son, who predeceased that event, having conveyed the lands to a stranger by settlement?

Yes; it being within the father's power to implement the contract by granting a *de presenti* absolute conveyance to the existing heir of the marriage, though it should exclude the chance of succession of the other children.¹(n)

867. What declaration or provision ought the contract to contain in order to exclude the heir of the marriage from discharging in favour of his father his rights under the deed?

(1) The contract may contain a declaration that such a discharge should be void and of no effect in excluding the issue of the marriage (other than the granter of the discharge), who, under the destination in the contract, should be entitled to succeed to the lands on the death of the husband; or (2) it may contain a declaration that the term "heir of the marriage," should import the person possessing that character on the death of the husband, and none other; or (3) the lands may be destined not to the heirs of the marriage generally, but to the eldest son or heirs of the intended marriage alive at the death of the husband.²

868. Where danger is apprehended of the wife being induced

¹ Bell's Prin. 1970; Duff's Feud. Conv. 400; Sandford on Succession, i. 247; Trail, M. 12985. ² Duff's Feud. Conv. 402; Jur. St. i. 197.

(n) Under marriage-contracts the heir of the marriage cannot assign his right of succession to a third party, so as to make the assignation effectual in the event of the heir predeceasing his father; Maconochie, 12th Jan. 1780, M. 13040; but he may transact with his father and discharge his right, so as to bind his own heirs, though he should die before his father; Routledge, 19th May, 1812, F.C.; aff. 2 Bligh, 692.

improperly to renounce her provisions, how may this be prevented in the contract ?

By inserting a clause declaring that it shall not be in the power of the wife to restrict, discharge, or burden her provisions without the consent of certain parties named, it being provided that any deed granted by her affecting the provisions without such consent shall be void, and that the provisions shall subsist for her aliment and maintenance as if no such deed had been granted. (2) Or the desired object may be accomplished by an antenuptial trust, which, when duly constituted, is irrevocable.¹

869. Is it necessary to declare the provisions to the younger children to be a burden on the estate destined to the heirs of the marriage ?

(1) Where the father is not divested of the fee, as where the destination is to the spouses in conjunct fee and liferent, and the heirs of the marriage, it is unnecessary to declare the younger children's provisions to be a burden on the estate, because the provisions are equally onerous as the destination, and must be paid by the heir, if there be an insufficiency of personal estate. (2) But where the father is divested of the fee, or has only a fiduciary fee, the younger children's provisions must be declared in the contract to be a debt against the heir of the marriage or the estate.²

870. May the father make provisions for the younger children by burdening the subjects conveyed to the heir, or by a conveyance of part of the subjects themselves ?

The father may burden the subjects with rational provisions to the younger children, where no provision has been made for them in the contract ; but he cannot provide for them by a direct conveyance of part of the subjects, as that would be an alteration of the destination.³

871. Where heritable security has been granted, and infestment taken thereon, for antenuptial provisions to children, payable after the father's death ; Can the

¹ Jur. St. i. 209.

² Duff's Feud. Conv. 417.

³ Bruce, M. 13036 ; Dykes, 9th Feb, 1811, F.C.

children compete with the father's creditors for their provisions?

(1) Where the provisions are not payable till after the father's death, the children have no *jus crediti*, and cannot compete with the father's onerous creditors, although heritable security has been granted for the provisions,^(o) on the principle that a security

(o) The doctrine here stated is in conformity with Brown, cited (*infra* p. 404, note 1), but that case was decided by the narrowest possible majority, and since then an opposite view seems to have been taken. The obstacle to the validity of the security was supposed to lie in its incompatibility with an obligation merely contingent, but this view seems equally fatal to a security through trustees; and accordingly, Lord Medwyn (Herries & Co., 9th March, 1838, 16 S., 948, cited, *infra*, p. 404, note 2), doubted whether in such a case an infeftment, "although to trustees for the children," "would enable the children to compete in the father's lifetime with his onerous creditors," but he admitted that the security would take effect after the father's death. A cautioner's relief, however (whose obligation is as contingent as the other), can be secured by infeftment. In the same case, Lords Meadowbank, Corehouse, Fullerton, Moncreiff, Jeffrey, and Cockburn, said in a joint opinion (in which they questioned the authority of Brown, *supra*)—"If the father's heritable estate is engaged for the performance of his obligation by an infeftment over it, standing in the person of the children, or what is precisely equivalent, in the person of trustees for their behoof, the plain language of that engagement is that the provision shall be made effectual by means of the infeftment if the father fails to do so out of his other means." In Herries & Co. the security was through trustees, and a real burden on the father's infeftment, and was found effectual against creditors. In a later case, where the obligation was to pay to the wife in liferent and the children in fee, and the conveyance in security, which was in the same terms, was followed by infeftment, the claim was found preferable in competition with creditors, the ground of whose challenge, indeed, rested entirely on objections to the formality of the sasine; Barstow, 18th Feb. 1858, 20 D. 612. The principle which ruled that case is laid down in Bell's Com. i. 685, and was quoted and adopted by Lord Moncreiff in Goddard, 9th March, 1844, 6 D. 1018. See also observation *per* Lord Deas in Napier, 18th Nov. 1864, 3 M'P. 57—"The circumstances that the right of these heirs was only contingent would not have been fatal to the real burden, for the real burden may be effectually created although the right is merely contingent." It is therefore thought that a principle somewhat different from what is stated in the answer has now been recognised, and that heritable security can be effectually given, even for provisions that confer no *jus crediti*, by means of infeftment in liferent alienarly in favour of the parents, or either of them, and of the children *nascituri* in fee, thereby vesting a fiduciary fee in the former for behoof of the latter. In reference to another principle which has been supposed to create a difficulty in such matters, the Lord Justice-Clerk Hope

is only accessory to the principal obligation.¹ (2) But where the heritable security is constituted in the person of a trustee, that will give the children a preference, since by this means the father is divested of the fee.²(r)

872. Can the children enforce an obligation by the father to invest a sum of money in security of their provisions?

Where, from the terms of the provision, the children have a *jus crediti*, and not merely a *spes successionis*, implement may be enforced by action or diligence, if the father has the means of fulfilling his obligation, without disposing of effects which form the source of his livelihood.³

(3.) *Postnuptial Contracts.*

873. In what respects do provisions to the wife in antenuptial and postnuptial contracts differ in effect?

The provisions and prestations in an antenuptial contract, being conditions of the marriage, are onerous, and not only bind the parties themselves, but are effectual as against creditors to raise a *jus crediti*, or give an absolute preference.(s) Postnuptial settlements, on the other hand, are not so highly onerous as

¹ Brown, 1st Feb. 1820, F.C. ; 110 ; Herries, Farquhar & Co., 9th Poole, 22nd Feb. 1834, 12 S. 481.(p) March, 1838, 16 S., 948.

² Bushby, 23rd June, 1825, 4 S. ³ Henderson, M. 6563 ; Duff's Feud. Conv. 420.

observed in Barstow, *supra*—"I am not satisfied that the Court is bound to adopt the notion that the fee cannot, to use the common phrase, of itself a fiction, be *in pendente*, except in the exact class of cases in which the Court have proceeded on that rule ; and hence, that if the interests of parent and child are really not a liferent and a fee in the same estate, there will not be a security for the fee to the children to be born ; I give no opinion on that question."

(p) This was not a case of marriage-contract provisions.

(r) If by this is meant that the father is divested of the subject of the security, it is incorrect. A security being a mere burden on the fee, the father would not be divested, and it is not necessary to the efficacy of the security that he should be so.

(s) If appropriately and effectually framed for this purpose.

antenuptial provisions, the parties after the marriage not being independent contractors, but having a common right in the goods in communion, and a mutual interest adverse to the interest of creditors. Provisions of the latter class, therefore, are revocable, unless rational or remuneratory, and the general rule is, that they have no effect as against the husband's creditors, when granted after his insolvency.¹ The natural obligation, to aliment a wife, however, has been held to sustain a postnuptial provision to a moderate extent, though granted when the husband was insolvent.^{2(t)}

874. To what extent are postnuptial provisions to the wife effectual in competition with creditors?

(1.) Where there is no antenuptial contract, a postnuptial provision to the wife will be effectual if moderate in amount, and if the husband is solvent at the date of granting it;³ but such provisions will be set aside, in so far as they are excessive and disproportionate to the husband's means at the date of the provision.⁴

(2.) Where there has been an antenuptial contract, postnuptial provisions are accounted donations revocable by the parties, either expressly or tacitly by the contraction of debt, and are therefore ineffectual in competition with creditors.⁵

875. What is the effect of a discharge by a wife, without consideration, of provisions in her favour in an antenuptial contract?

The discharge is revocable as a donation, *inter virum et uxorem*.

876. Where the husband, by an investment in name of trustees, makes a postnuptial provision to his wife in addition to her provisions in the antenuptial contract ;
Is the postnuptial provision revocable?

(1) If the provision is onerous and remuneratory, it will be

¹ Ersk. 4, 1, 33, 34 ; Bell's Prin., 1942 ; Menzies Lect. 437 (453).

² Ferguson, M. 1001.

³ Ersk. 1, 6, 30 ; Jeffrey, 24th

May, 1825, 4 S. 32 ; Sharp, 19th Jan., 1839, 1 D. 396.

⁴ Ersk. 1, 6, 30 ; Short, M. 6124.

⁵ Ersk. 1, 6, 30 ; M'Lachlan, 6th July, 1839, 1 D. 1177.

(t) See Bell's Com. i. 687.

irrevocable; not in virtue of the trust, but on the principle of mutual contract.¹(u) (2) If the provision is without proper consideration, it is revocable as a donation *inter virum et uxorem*,^(x) and the power of revocation cannot be elided by giving it nominally or in trust to a third party.² (3) If the deed by which the provision is granted contains a right in favour of a third party, it is said to be wholly irrevocable.³(y) [Allan, 8 M'P. 34.]

877. May a father encroach on children's provisions in an antenuptial contract by settlements on the wife and children of a second marriage?

(1) A father may effectually settle rational provisions upon the wife and children of a second marriage, although such provisions should encroach on the provisions to the children of the first marriage, if he has no other fund out of which he could provide the second wife and children.⁴ (2) But he cannot make such provision by a direct conveyance of a portion of the subjects destined to the heirs of the first marriage.⁵ (3) If the father by the first contract has been divested of the fee, or the fund placed beyond his control, it is doubtful whether he can affect the provisions in the first contract by subsequent settlements.⁶(z) [Arthur, 8 M'P. 928; Walkinshaw, 10 M'P. 763.]

¹ Hepburn, 6th June, 1814, 2 Dow's App. 342.

² Ersk. 1, 6, 29; Sanders, M. 6108; Jardine, 17th June, 1830, 8 S. 937.

³ Ersk. 1, 6, 29.

⁴ Ersk. 8, 8, 42.

⁵ Duff's Feud. Conv. 418; Bruce, M. 13036; Dykes, 9th Feb. 1811, F.C. p. Lord Pres. Blair.

⁶ Guthrie, 21st Nov. 1846, 9 D. 124.(z)

(u) Gentles, 23rd June, 1826, 4 S. 749, which see as to effect of provisions to third parties.

(x) Circumstances in which held not revocable; Rust, 14th Jan. 1865, 3 M'P. 378.

(y) It is the right in favour of the third party that is irrevocable; Heisleid, M. 6087, and 6106, where a husband having obliged himself by ticket to his wife to pay her and her former husband's debts, it was held that he could be sued thereon at the instance of any of the creditors.

(z) In Guthrie (cited) there had been a conveyance to trustees for the first family; the father conveyed part of the trust property to his second wife, who was infert before the trustees. In a reduction at their instance, the Court was equally divided as to whether the second wife's security should be restricted or set aside. The case was afterwards compromised without any judgment.

878. Where security for an antenuptial provision has been given by the husband during the marriage, and while insolvent, will it be sustained in a competition with creditors?

The security will be sustained, notwithstanding the husband's insolvency at the time; as having been granted for a just cause.¹(a)

(4.) *Bonds of Provision.*

879. Whether are bonds of provision to wife and children held to be in fulfilment of, or in addition to provisions secured to them by marriage-contract?

(1) Where the bond to the wife does not express the cause of granting, it is reckoned in fulfilment of the wife's marriage-contract provisions; on the principle *debitor non presumitur donare*.² (2) If the bond bear to be granted from favour and affection, it is reckoned an additional provision.³ (3) Bonds of provision to children are, from the presumption of paternal affection, held to be additional in the absence of a declaration to the contrary;⁴ but the presumption may be overcome by circumstances showing an opposite intention on the part of the father.⁵ (4) Provisions to a daughter in her marriage-contract are held to be in implement of obligations in the marriage-contract of her parents;⁶ but there is no presumption in law that tocher settled upon a daughter is to be taken in implement of provisions in a *voluntary settlement* by the parent.⁷ [Elliot, 11 M'P. 735; Cowan, 1 R. 119.]

¹ Mackenzie, M. 958; Campbell, M. 1000.

² Menzies Lect. 441 (458).

³ Fenton, M. 11491.

⁴ Ersk. 3, 3, 93; Clark, 16th May, 1823, 2 S. 313.

⁵ E. of Wemyss, 23rd Nov. 1810, F.C.

⁶ Ersk. 3, 3, 93; Robertson, M. 9619.

⁷ Kippen, 21st May, 1858, H. of L.(b)

(a) In so far as regards the wife this answer is supported by Mackenzie and Campbell, cited; but as regards children, the case would come under the Act 1621, and be reducible; Queensberry, M. 961.

(b) Reported, Court of Session, 7th July, 1856, 18 D. 1137; H. of L., 20 D. 11, 3 M'Q. 203. In both courts the judgment was that of a majority. By voluntary settlement is here meant a testament or *mortis causa* deed.

880. What is the effect of a bond of provision to a child, payable at majority, or at a certain date, where the child dies before the term of payment?

(1) Where the bond is payable at majority, it lapses by the child's predecease, majority being a condition of the obligation ;(c) on the principle, *dies incertus pro conditione habetur*.¹ But if the predeceasing child have left issue, such issue will be entitled to the provision.² (2) Where payable at a certain date, the bond *when delivered*, vests in the child, and will be payable to his next of kin,(e) although he predecease the term of payment.³(f)

881. A provision was granted by a father to a son, and his heirs and assignees, payable at the father's death. The son died before the granter, leaving issue, and a will in favour of his widow ; Was the provision exigible, and by whom ? State the reason.

The provision is exigible by the son's issue, to the exclusion of the widow ; on the principle that a provision is not assignable until it has vested in the grantee, and that it does not lapse by the grantee's predecease if he have left issue, such issue being entitled to the provision.⁴(h)

¹ Edgar, M. 6325 ; Omev, M. 6340 ;(d) Bell's Prin. 1990.

² Campbell, M. 6342.(f)

⁴ Campbell, *supra*.(g)

³ Wood, M. 13048 ; Binning, M. 13047.

(c) The same rule holds if the bond is payable at marriage and the child dies unmarried.

(d) In Omev the provision was by a grandfather, in which case the rule is the same.

(e) Or assignee.

(f) The case of Campbell, cited, may be contrasted with that of Bells, M. 6332, which, though it seems to contradict, really confirms it. In this case (Bells) the bond was payable "at the term of Whitsunday, 1747, which would be the first term after his attaining to the age foresaid," sixteen. The child died before sixteen, and the provision was found not due, the reference to a certain age being held to import a condition that he should attain that age notwithstanding the fixed term of payment.

(g) The report of Campbell does not contain the point here referred to.

(h) It makes no difference in regard to the condition *si sine liberis* whether the bond is conceived in favour of heirs and executors or not ; Russell, 10th March, 1769, F.C. ; Wood, 26th June, 1789, F.C.

882. A party conveyed a fund to trustees, directing the life-rent produce to be paid to A and B, spouses, and the survivor of them, and on the death of the survivor the capital to be made over and accounted for to the child or children of the marriage. The only issue of the marriage was a daughter, who survived A but predeceased B; Was a bequest of the fee of the fund by the daughter effectual?

It was held that the bequest by the daughter was not effectual, the right to the fee not having vested in her.¹(i)

¹ Boyle, 14th May, 1858, 20 D. 925.(i)

(i) In Boyle, cited, there was a point not stated in the question, and which is not noticed either in the rubric of the report or in the digest (4, 511) of the case, but which seems sufficient for the disposal of it, and was the basis of the opinions of the majority of the judges on which the decision proceeded. The deed directed that on the death of the surviving spouse the property should "be made over and accounted for to the child or children *then existing* of the marriage;" in reference to which direction, it was observed, in the opinion of the Lord President, Lords Ivory, Curriehill, Benholme, Neaves, Ardmillan, and Mackenzie—"We consider these words to be plain and decisive, limiting the beneficiaries to those children alone, one or more, who should survive the last surviving parent." The same principle had been applied, Lockhart, 26th Feb. 1858, 20 D. 690. Boyle therefore is not in point, and the precise case put in the question seems never to have occurred. It appears to have been held, however, that provisions such as that referred to vest *a morte testatoris* in the children, where more than one, as a class, though not to the effect of being assignable before the term of payment; Cattanach, 2nd July, 1858, 20 D. 1206, and Maitland's Trs., 15th March, 1861, 23 D. 732, *per* Lord Justice-Clerk. This principle seems, so far as the vesting goes, equally applicable where there is only one child; but there still remains the question as to the power of such child to assign. In Maitland's Trs., *supra*, the general rule on this point was relaxed. Here a party directed his trustees, on his youngest child attaining majority, to divide the residue of his estate among his children, or the survivors or survivor of them, the issue, if any, of any predeceaser to take his share. There were three children, of whom one predeceased his father, and the other two died in minority, and all without issue, but the youngest left a will. Held that the whole residue had vested in him, and was carried by his will. This case comes very near to the one put in the question, and if it is to be held as of authority, would probably rule it, and lead to the opposite conclusion to that stated in the answer; but it is to be observed that Maitland's Trs. was decided before the judgment of the House of Lords was given in Donaldson's Trs., 14th Feb. 1862, 24 D. 1, 4 Macq. 314. See *infra*.

883. What is the distinction between conditional institution and substitution ?

A conditional institution is a conveyance or destination to a person, in the event only of an expressed condition being purified, his right vesting at once on the purification of the condition, but being completely evacuated if the condition should take effect. Thus a destination to A, in the event that B should predecease the disponent, is a conditional institution to A, whose conditional right becomes absolute if B die before the disponent, but is entirely cut off in the event of the survivance of B. Substitution on the other hand, is the naming of an heir to a disponent, or the appointment of a person to succeed to the grant after the death of the institute or person first called, the substitute's right subsisting, notwithstanding the succession of the institute, yet defeasible by the latter, who may "alter and disponent at his pleasure during his life."¹ A destination to A, whom failing to B, is a case of substitution. "Where there is a proper conditional institution, the deed will entirely fall and be evacuated if the condition should not be purified; but where there is a substitution, the deed subsists, and the substitute may claim under it at any time till the destination in his favour shall be altered."—*Professor More.*²(l)

884. A sum of money was bequeathed to A in liferent, and the heirs of her body in fee, whom failing to C; Whether did the bequest after A's death belong to the executor of A's son, who predeceased, or to C?

It was held that the bequest belonged to the executor of A's son, as the destination imported a conditional institution and not a substitution of C; substitution not being presumed *in dubio* in

¹ Stair, 3, 5, 51.

More's Notes, 327; Duff's Feud.

² Stair, 3, 5, 51; Ersk. 3, 8, 44; Conv. 104.(k)

(k) This reference is wrong, and the passage referred to has not been found.

(l) But a proper substitution also implies a conditional institution as the lesser right, and if an institute die without having acquired a vested interest, the person substituted succeeds, not as substitute, but as conditional institute; M'Laren on Trusts, ii. 243. [M'Laren on Wills, i. 493.]

grants of moveables, which are not naturally the subject of such a destination.¹(*m*) [Paul, 10 M'P. 937, *per* Lord Cowan.]

885. What is the effect of substitutions of children to each other in bonds of provision?

(1) If the institute die, leaving children, they take in preference to the substitute; under the condition *si sine liberis decesserit*.²(*o*) (2) The substitution cannot be disappointed gratuitously.³ (3) It may be defeated for causes which are reasonable, though not strictly onerous.⁴

886. A provision is made to children of £5000 if there be one child of the marriage, £7500 if there be two, and £10,000 if there be three or more, under the declaration, that the share of a child dying before the provision was paid, or became payable, should revert to the survivors; and two children died in infancy, and a third survived; What is the extent of his right?

The surviving child is entitled to the £10,000, this being a

¹ Brown, M. 14863.(*m*)

² Macreadie, M. 4402.

³ Rongheads, M. 6403.(*n*)

⁴ Smith and Wallace, M. 4332.

(*m*) Taking Brown, cited, as the basis of this answer, it is to be understood that A's son survived A but predeceased C, and there was a circumstance in that case on which, though not necessary for the judgment, it appears from the report in Bell's 8vo Cases (p. 310), though not in the Dictionary, that at least some of the judges rested their opinion, viz.—that A's child died in infancy, but that her father, as her administrator, had during the infant's lifetime obtained decree against C, who was the executor and universal dispositive of the testator, and the child having died before payment was got, the father confirmed executor, and claimed the legacy. This might have been held equivalent to reducing the bequest to possession, the want of which was the ground of C's claim, or as barring C, who was the party liable in payment, from claiming, in respect that he was in *in mora*. See Ans. 944, and note.

(*n*) See also Mags. of Montrose, M. '6398; Mackenzie, M. 6602.

(*o*) The presumption on which this rule rests may be excluded by circumstances founding an opposite presumption, and the substitution receive full effect though there are children; Earl of Lauderdale, 19th May, 1830, 8 S. 771. See on the effect of the condition, Sturrock, 29th Nov. 1843, 6 D. 117; Douglas, 21st Dec. 1843, 6 D. 318; Black, 17th Feb. 1844, 6 D. 689; Thomson's Trs., 10th July, 1851, 13 D. 1328.

case of conditional institution, and not substitution. If the surviving child had been a substitute, no right could have arisen to the shares of the predeceasing children, as such shares had never vested in them.¹(p)

887. What conditions are implied in direct substitutions after children of the granter?

(1) That the substitute shall take, on the death of the child, only *si sine liberis decesserit*. (2) That if the child should die, leaving lawful issue, the substitution is to be entirely evacuated, even after the death of the grandchildren, and is to take effect only if the institute die childless.²

¹ Broomfield, 24th Nov. 1835, 14 S. 51.

² Bell's Prin. 1776.

(p) The real question in Broomfield, cited, was whether the enlarged provision was contingent simply on birth or on survivance of the father.

The following cases may be referred to as to the import of provisions in marriage-contracts in favour of children:—Brodie's Trs., 12th Nov. 1840, 3 D. 31. Here the husband bound himself "to make payment to the child or children of the present marriage, and who shall be in existence at its dissolution" (whether by the decease of husband or wife), "of the sums of money after specified—viz., if there happens to be only one child, whether male or female, the sum of £6000 sterling; and if two or more children, the sum of £9000 sterling," payable at the first term, &c., twelve months after the death of the husband, and to "bear interest from the first of these terms immediately preceding his decease;" the marriage was dissolved by the death of the wife, leaving two children, one of whom afterwards predeceased the father. Held that the provision vested at the dissolution of the marriage, and that on the father's death the surviving child was entitled to the whole £9000. In Grant's Tr., 1st Feb. 1866, 4 M'P. 336, a father, in his daughter's marriage-contract, bound himself to lay out at the term, &c., next after his death, or as soon thereafter as circumstances would permit, the sum of £2000, upon sufficient bonds, payable to the spouses, and the survivor of them, "in conjunct liferent, for the liferent use of them, and the longest liver of them, alienarly, and to the child or children procreated of the marriage, whom failing, to the nearest heirs or assignees" of the wife's father, himself in fee; and it was provided that the sum should bear interest (from which the husband's *jus mariti* was excluded) from the date of the spouses leaving the family of the wife's father. One child was born, which predeceased both parents and also the wife's father. Held that, as the child predeceased the dissolution of the marriage, the fee of £2000 never vested in it, and on the death of both spouses belonged to the heirs and assignees of the wife's father.

888. A bequest of £1200 was made by a testator to his children, A, B, C, and D, and the survivors or survivor of them; A and B predeceased, while C and D and a son of A survived the term of vesting; How will the bequest be divided?

C and D are entitled to £450 each, and A's son to £300 only, the latter not being entitled to participate in the share which would have fallen to B, his predeceasing uncle, as "the effect of the implied condition, *si sine liberis*, is only to convey to the children the share of the parent, which otherwise would have lapsed, and not to convey to them any right to claim an interest along with survivors, in other lapsed shares."—*Per Lord Cowan.*¹(t)

III. TESTAMENT AND DISPOSITION AND SETTLEMENT.

(See Privileged Writings—Delivery of Deeds—Capacity of Parties.)

889. What is peculiar in the form of the testament as a conveyance?

The peculiarity in the form of the testament is the nomination of an executor to administer the moveable estate for the benefit of all concerned; the deed in this form being effectual, without words of direct(u) conveyance, as a transmission of the moveable property to the executor, although it should not contain directions for the distribution of the estate. Where such directions are wanting the executor is regarded as *hæres fiduciarius*, or trustee, accountable to the next of kin, creditors, and others having interest in the succession.²

¹ Forbes' Tra., 19th May, 1830 ;(r) Walker, 20th January, 1859, 21 D. Thornhill, 20th January, 1841 ;(s) 286.

² Ersk. 3, 9, 5.

(r) Reported (Lauderdale), 8 S. 771.

(s) Reported, 3 D. 394.

(t) But if C and D had also predeceased without issue, A's son would have taken the whole, and not merely his parent's share; Cattanach, 2nd July, 1858, 20 D. 1206. It was also held there that the share falling to a child in right of the parent is payable to the administrator at the term when it would have been payable to the parent, if alive.

(u) Or *de presenti*.

890. Where several testaments by the deceased are found in his repositories, which of them receive effect?

(1) Where the several deeds are inconsistent with each other, and incapable of standing together, effect will be given only to the last; (2) where the last is but partially inconsistent with the former deeds, these will be held to be revoked only in so far as they are inconsistent; (3) where it appears to have been the testator's intention that all the deeds should receive effect, and the whole can be consistently executed, the executors are bound to do so.¹(z) [Sibbald, 9 M.P. 399; Low, 11 M.P. 744.]

891. May a delivered will be revoked in which the right of revocation is expressly renounced?

Yes; because a testament is the *sententia voluntatis* of the testator as at his death, and it is then only that the deed takes effect.²

892. Where a party, by a delivered will, has gratuitously discharged a debt with absolute warrandice; Has he power to revoke the discharge?

He has power to revoke the discharge; because a will may be revoked after delivery, and although the power of revocation is renounced.³

893. May a mutual settlement by a husband and wife be revoked?

(1) A mutual settlement cannot be revoked after execution without the joint consent of both parties; because it imports "not merely a declaration of intention, but an obligation not to revoke; it is a sort of contract."⁴ (2) Without express power the

¹ Grant, 27th Feb. 1849, 11 D. 860, aff.(x) 28th June, 1852, 1 Macq. App. 163.(y)

² Dougall's Trs., M. 15949.

³ Dougall's Trs., *supra*; Miller, 11th July, 1826, 4 S. 822; Trotter, 1st Dec. 1842, 5 D. 224.

⁴ M'Millan, 28th Nov. 1850, 13 D. 188, *per* Lord Fullerton.

(x) The judgment of the Court of Session in Grant was altered in House of Lords.

(y) See also Scott, 5th Feb. 1864, 2 M.P. 613.

(z) See *supra*, note (n), p. 25.

survivor cannot revoke so as to affect third parties, even as to the property acquired by the survivor after the predeceaser's death, where such property is conveyed by the settlement. But in this question as to the property subsequently acquired, regard will be had to the circumstances of the estate, and the intention of the parties, as appearing from the whole tenor of the deed.¹ (3) Where the wife's provisions in a mutual settlement are grossly unequal, she is entitled to revoke, even after the husband's death.² [Husband found entitled to revoke after wife's death, the consideration being unequal, Mitchell, 4 R. 800.]

894. What is the effect of a testament in favour of a stranger, if the testator have children after it is made?

The testament will be ineffectual, in virtue of the implied condition, *si sine liberis decesserit*. Formerly it was held that the testament was effectual if it had been preserved after the birth of children;³ but this circumstance was not regarded in the cases cited *infra* as of itself sufficient to elide the implied condition.⁴(b)

¹ Nimmo, 24th Jan. 1840, 2 D. 458. Colquhoun, 5th June, 1829, 7 S. 709.

² M'Neill, 8th Dec. 1829, 8 S. 210.(a) See Nisbet, 24th Feb. 1835, 13 S. 517. ⁴ M. of Montrose, M. 6398; Neilson, 4th June, 1822, 1 S. 458; Dixon, 10th June, 1836, 14 S. 938; aff. 9th Feb. 1841, 2 Rob. App. 1.

³ Ersk. 8, 8, 46; Yule, M. 6400; Feb. 1841, 2 Rob. App. 1.

(a) The ground of judgment in M'Neill was not so much the inequality of the provision itself as a condition annexed to it, that the wife should forfeit everything in the event of her marrying again.

(b) In none of the cases here cited were there children of the testator born after the deed had been made, and in all of them the point at issue was as to the right of children of beneficiaries to succeed to provisions in favour of their parents, who had predeceased the testator. Thus in Dixon the question was as to the right to a provision in favour of the testator's eldest son, without mention of heirs, he, the son, having predeceased his father one day, leaving children, and they were preferred to the provision. The point referred to in this answer does not seem to have arisen since Colquhoun (cited, note 3), and there (though the deed was set aside, the father having survived the birth of his child only three months) the principle that it might have become effectual was distinctly recognised, Lord Pitmilley observing—"If the testator had lived a competent time, the presumption would have operated against the first presumption of the *conditio si sine liberis* being implied."

895. Is the executor, as such, entitled to any portion of the executry?

Executors were entitled under the statute 1617, c. 14, to retain a third part of the executry(c) for their trouble; but that enactment was repealed by the Intestate Moveable Succession Act, which declares that executors-nominate shall, as such, have no right to any portion of the estate.¹

896. A person granted a conveyance to his heir-at-law of his whole estate, heritable and moveable, but under burden of his debts and legacies; the heir repudiated the conveyance, taking up the heritable estate as heir-at-law, and not claiming the moveables; Did he thereby free himself from liability for the personal debts and legacies?

The heir would be liable for both the personal debts and the legacies, as "heirs must fulfil all the deeds of their ancestors under whatever title they may take the estate;"² but he would have relief for the personal debts against the executor.³

[**897.** By what statute was the action of reduction *ex capite lecti* abolished?

By the Act 34 & 35 Vict. c. 81, as regards persons dying after 16th August, 1871.

Note.—Several questions on the law of death-bed in the last edition have not been repeated.]

898. Where a party has executed a revocable disposition *mortis causa* of certain subjects, Is the conveyance held to be revoked by a subsequent general disposition and settlement of the party's whole estate?

The general disposition and settlement does not operate as a revocation of the prior special conveyance, unless from the terms of the deed it be manifest that such was the testator's intention.⁴

¹ 18 Vict. c. 23, § 8.

² Ersk. 3, 8, 51.

³ Ersk. 3, 8, 97. See Ana. 239.

⁴ Weir, M. 11859; Drummond, M. 11873; Thomson, 18th Nov. 1836, F.C., 15 S. 32.

(c) It was only to a third part of any free residue of the dead's part, after deducting debts and legacies, that executors were entitled; Ersk. 3, 9, 26.

[The recent decisions appear to establish the proposition that, in the absence of evidence of a contrary intention, general words of disposition in a *mortis causa* deed *do* include heritable property vested at the date of the deed in the disponent, with a special destination to heirs-substitute. See Thoms, 6 M'P. 704 ; Campbell, 7 R., H. of L. 100. But these cases should be compared with Glendonwyn, 11 M'P., H. of L. 33.]

899. How did a general disponent obtain a real right to feudal subjects before the Titles to Land Act came into effect, and what is the procedure introduced by that statute?

Before the Titles Act—

(1.) Where the ancestor's title was personal, the general disponent, having right by the general conveyance to the unexecuted precept and procuratory in the ancestor's favour, made up a title either by infeftment on the assigned precept, or by a charter of resignation proceeding on the assigned procuratory and infeftment thereon.

(2.) Where the ancestor's title was feudalised, the general disponent got the heir to complete a title by service, or precept of *clare constat* and infeftment, and thereafter obtained a special disposition from him in implement of the general conveyance, and took infeftment.

(3.) If the heir refused to make up a title, the general disponent led an action of constitution and adjudication in implement against him, and, after obtaining decree, he got from the superior a charter of adjudication in implement, and took infeftment thereon. Although the decree contained a precept of sasine, infeftment on it was apparently incompetent where the heir had made up no title, as the Lands Transference Act provides that the adjudger's title might be completed by infeftment on the decree only "where the person adjudged from" is entered with the superior or is in a situation to charge the superior to grant an entry by confirmation.¹

¹ 10 & 11 Vict. c. 48, § 19 ; (2) Liddle, 17th Nov. 1855, 18 D. 61.

(2) Where the subjects were burgage, the procedure was under 10 & 11 Vict. c. 49, § 8.

(4.) Where the general conveyance was of all lands belonging to the granter(*m*) and contained a precept of sasine, the general disponee might obtain immediate infeftment in the lands by production to the notary of the ancestor's infeftments.¹

Under the Titles Act 1858—

(1.) Where the ancestor's title was personal, the general disponee might obtain a real right by expeding a notarial instrument, Schedule K, setting forth the unrecorded conveyance in favour of the granter of the general disposition, and also setting forth the general disposition, and by recording the former conveyance along with the notarial instrument and a warrant of registration; or by expeding and recording a notarial instrument, Schedule B, setting forth the unrecorded conveyance, and containing at length the portions of it by which the lands are conveyed, and also setting forth the general disposition.²

(2.) Where the granter of the general conveyance was feudally vested, the disponee might obtain a real right by expeding and recording a notarial instrument, Schedule H, setting forth the granter's title, and also the general disposition.³(*o*) [Consolidation Act, § 19, Schedule L.]

¹ See Ans. 643.

² 21 & 22 Vict. c. 76, § 12.

³ 21 & 22 Vict. c. 76, § 14.

(*m*) A general precept was applicable to a conveyance of part as well as of the whole lands; what was required was such a description as admitted (by reference to a sasine in favour of the granter) of the identification of the lands by written evidence produced to the notary.

(*o*) Questions sometimes arise as to what is conveyed by a disposition and settlement. An heir of entail in possession of an estate worth £2000 a-year, who possessed also forty-five acres of ground adjoining in fee-simple, executed, subsequent to the Entail Amendment Act, 1848, a trust-settlement, conveying especially those forty-five acres and all other lands and heritable estate of every description "for behoof of an only daughter, and any other children that might be born," exclusive always of any son who may succeed as heir of entail to the entailed estate. In an action at the instance of the daughter for declarator, that in respect of certain defects in the entail, her father had died vest in fee-simple in the entailed lands, and that they were effectually carried by his trust-deed, the Court, assuming, but not deciding, that the entail was defective, that the truster might have dealt with it as fee-simple property, and that the words of the deed were habile to convey it, held, on a construction of the whole deed, that the truster had not intended to convey the entailed estate, and therefore that it was not carried; *Leith or Hepburn*, 10th Feb. 1860, 22 D. 730. "It may always be made a question whether, in the circumstances,

IV. TRUST-DISPOSITION AND SETTLEMENT.

[900. What are the provisions of the Act of 1861 as to gratuitous trustees (24 & 25 Vict. c. 84), as explained by the Act of 1863 and the Trusts Act, 1867?

Section 1 provides that "all trusts constituted by virtue of any deed or local Act of Parliament under which gratuitous trustees are nominated shall be held to include the following provisions, unless the contrary be expressed; that is to say, power to any trustee so nominated to resign the office of trustee; power to such trustee, if there be only one, or to the trustees so nominated, or a quorum of them, to assume new trustees; a provision that the majority of the trustees accepting and surviving shall be a quorum; and a provision that each such trustee shall only be liable for his own acts and intromissions, and shall not be liable for the acts and intromissions of co-trustees, and shall not be liable for omissions." Section 3 is as follows:—"A gratuitous trustee shall, for the purposes of this Act, be held to be any trustee who receives no pecuniary or valuable consideration for performing the duties of a trustee, and is under no obligation, without special acceptance of such office, to discharge the duties of trustee: Provided always, that nothing in this Act shall extend to any trustee appointed under the contract of any trading company."

The Act of 1863 explains that the above enactments are to apply to gratuitous trustees, at whatever time the trusts may have been or may be constituted, and the expression "gratuitous trustees" includes gratuitous trustees holding *ex officio*.

The Act of 1867, § 1, says that the previous Acts are to extend to all trusts constituted by any deed "or by private or local Act of Parliament," and the words "gratuitous trustees" are to include all trustees not entitled to remuneration as such, in addition to benefit under the trust, or who hold office *ex officio*, and are to include all trustees who are entitled to any bequest under the trust, provided that no trustee to whom a bequest is made on condition of the

a general disposition and deed of settlement was meant to convey a particular subject;" *per* Lord Deas in *Chisholm*, 9th Dec. 1864, 3 M.P. 202. A similar case to *Leith or Hepburn, supra*, is at present in dependence (*Thoms*), of which two branches will be found reported, 27th March, 1865, 3 M.P. 776, and 19th Dec. 1865, 4 M.P. 252. See also *Callow's Trs.*, 23rd Feb. 1866, 4 M.P. 465.

recipient accepting the trust shall be entitled to resign under the Acts, unless otherwise declared in the trust-deed. The Acts apply only to gratuitous trustees; Mackenzie, 10 M'P.749.]

[901. What powers are by the Trusts Act, 1867, conferred on gratuitous trustees, where such powers are not at variance with the terms and purposes of the trust?

(1.) To appoint factors and law-agents, and to pay them a suitable remuneration.

(2.) To discharge trustees who have resigned, and the representatives of trustees who have died.

(3.) To grant leases of the heritable estate of a duration not exceeding twenty-one years for agricultural lands, and thirty-one years for minerals, and to remove tenants.

(4.) To uplift, discharge, or assign debts due to the trust-estate.

(5.) To compromise, or to submit and refer all claims connected with the trust-estate.

(6.) To grant all deeds necessary for carrying into effect the powers vested in the trustees.

(7.) To pay debts due by the truster or by the trust-estate without requiring the creditors to constitute such debts where the trustees are satisfied that the debts are proper debts of the trust, § 2.]

[902. What powers may under the last-mentioned Act be granted by the Court of Session to the trustees under any trust-deed, if expedient for the execution of the trust, and not inconsistent with the intention thereof?

(1.) To sell the trust-estate or any part of it.

(2.) To grant feus or long leases of the heritable estate or any part of it.

(3.) To borrow money on the security of the trust-estate or any part of it.

(4.) To excamb any part of the trust-estate which is heritable.

The Act provides that when the beneficiaries under the trust, in existence at the date of the petition to the Court, are of full age and capable of acting, it shall be in their power, by deed of consent, to grant authority to the trustees to do any of the said acts, the same not being inconsistent with the intention of the trust; and such authority being obtained, the said acts shall be

equally valid as if the authority of the Court had previously been obtained, § 3.

Weir, 4 R. 876, power of sale granted; Hay, 11 M.P. 694, the same power refused; Downie, 6 R. 1016, the same power granted; Oliver, 3 R. 639, power to feu refused; Cameron, 18 S. L. R. 585, power of sale granted.

This important statute contains other provisions.]

903. Does a nomination of trustees where there is no destination to acceptors and survivors, fall by the failure of one or more, or by the failure of a trustee *sine quo non*?

Unless the appointment expressly bears to be joint, the nomination will not fall by the failure of one or more of the trustees; on the principle that a truster prefers that any one of the trustees nominated should manage the estate rather than a judicial factor. Nor will it fall by the failure of a trustee *sine quo non*, unless that be the express intention of the truster.¹ But the concurrence of a trustee *sine quo non* after acceptance is indispensable to every act.²

904. Where a certain number of trustees are appointed a quorum, Must that number accept and survive in order to execute the trust?

The question whether the nomination falls by the failure or non-acceptance of the specified quorum will be determined by the truster's intention as appearing from the settlement, and if from the context of the deed it is apparent the truster intended that the trust should not be executed by fewer than the specified number, it will fall if that number do not survive and accept.³ But the presumption is for the subsistence of the trust while any of the trustees survive and accept.⁴

905. What is the effect of a failure of trustees, or a failure of instructions?

(1) On a failure of trustees, the Court will appoint a judicial

¹ Campbell, M. 14703; Forbes, M. App. "Solidum," No. 2; Findlay, 30th June, 1855, 17 D. 1014; Seton, 28th Nov. 1855, 18 D. 117; Menzies Lect. 671 (704).

² Vere, 1st June, 1791; Bell's 8vo Cases, 554.

³ Halley, 20th Feb. 1840 (2 D. 623).

⁴ Cases in note 1, *supra*.

factor to execute the trust [or new trustees Trusts Act, 1867, § 12]; (s) (2) but in the event of a failure of instructions, the trust falls, and the trustees are bound to denude in favour of the heir. (t)

906. By trust-disposition and settlement, there was a conveyance to three trustees, and the survivors and survivor, and additional trustees were appointed by a codicil, but the words survivors and survivor were not repeated. A title was made up by the truster's heir and a conveyance was executed by him to the trustees, and their heirs and assignees; Have the survivors power to act?

Yes; because the title does not control the trust, nor define or limit the powers of the trustees, but the trust overrules and governs the title. The powers of the trustees are therefore to be taken from the trust-deed, by which, in this case, the survivors have power to act.¹

907. Where the trust-deed does not contain a destination to the survivors of the trustees, Does the entire trust accresce to the survivors, or does any right pass to the heir of a deceasing trustee? State the reason.

No right passes to the heir of a deceasing trustee; because trustees do not have a separate and *pro indiviso* right, but each has a full title along with the others, and if one dies, the title in

¹ Gordon's Trs., 17th July, 1851, 13 D. 1381.

(s) "Where the trustees refuse to act, it may be necessary, from the structure of the deed, that they shall act not to the effect of the acceptance of the trust, but to the effect of dealing with that interest which has been formally given to them, so as, without involving themselves in the office of trustee, to make it necessary for them to execute certain formal deeds in order to restore the title to the right shape."—*Per* Lord Ivory in *Royal Infirmary*, *infra*, note (v), Ana. 908.

Where, from conflicting interests or otherwise, it is necessary for the proper administration of the trust that it should be taken out of the hands of the trustees, the Court, on application and cause shown, will remove them and appoint a judicial factor; Thomson, 11th Jan. 1865, 3 M'P. 336.

(t) Where trustees were placed in a position in which their duties as such conflicted with their personal interests, it was held by the Lord Ordinary that they were entitled to apply to the Court for a declarator of their powers; Annandale, 8th Dec. 1864, 3 M'P. 200.

him becomes extinct, (u) being absorbed by the title subsisting in the others.¹ [See Conveyancing Act, § 43, as to completion of title by the heir of a sole or last surviving trustee.]

908. A party having executed a trust-disposition and settlement in favour of certain trustees, thereafter by codicil recalled the nomination and appointed new trustees, but without dispositive words; How do the new trustees complete a feudal title?

By direct infeftment on the trust-deed, or by registration; the want of dispositive words in the codicil being of no consequence, as the settlement and the codicil must be read together, and the term "trustees" in the codicil is held to mean "trust-disponees."²(v) [The Conveyancing Act, § 46, empowers trustees or executors to complete a tile to heritage by notarial instrument when "the words of conveyance, grant, or bequest" are not expressed to be in their favour.]

¹ Gordon's Tra., 17th July, 1851, 18 D. 1381.

² Mackilligin, 28rd Nov. 1855, 18 D. 83.

(u) A trust-deed, however, may be so framed as to constitute the heirs of deceasing trustees, or of any one or more of them, trustees in room of their predecessors. Where this is intended, the destination should be so conceived as to call in persons capable of acting, such as "the nearest heir-male who shall be major, *sui juris* and resident within Scotland at the time." If the estate consists of heritage, it must be vested in such substituted trustees, either by conveyance by the surviving original or acting trustees, or, if there are none such, by service or writ or precept in their favour as heirs of provision in trust under the deed, and their title completed *habili modo*.

(v) Mackilligin's case (cited) occurred prior to the passing of the Titles to Land Act 1858, and the point here referred to did not arise and was not there decided, though an opinion to the effect stated was expressed by Lord Justice-Clerk Hope. In the subsequent case of the Royal Infirmary, 28th June, 1861, 23 D. 1213, which occurred after the passing of both Acts, Lord Ivory said, in reference to the case put in the answer—"No doubt there would have been the puzzle that under such a deed as that there might not be the means of a direct infeftment of the trustees so as to invest them in the feudal title." In this case, Mackilligan was referred to by the judges. The competency of proceeding as stated in the answer has never been determined, but it is understood to have been at all events to some extent adopted in practice. It was probably intended that the Acts should have the effect supposed, as it is declared that "all codicils, deeds of nomination, decrees of declarator, and other writings bearing reference to conveyances separately granted, and naming or appointing persons to exercise or enjoy the rights or powers conferred by such conveyances,

909. Whether is the right of a beneficiary under a trust-disposition and settlement heritable or moveable?

(1.) If the trust-fund is moveable, the beneficiary's share is necessarily moveable.

(2.) If the trust-estate is heritable, the beneficial interest will be heritable or moveable according to the truster's instructions. And, 1. If the trustees are directed to convey lands to the beneficiary, his right is heritable.¹ 2. Where there is a power of sale,

¹ Durie, M. 4624.

shall be deemed and taken, for the purposes of this Act, to be parts of the conveyances to which they separately bear reference;" Titles to Land Act, 1858, § 36; Act 1860, § 2; but assuming this to be the meaning of the Acts, questions may arise as to the mode of carrying out their provisions. Supposing there is a *separate* deed of nomination or decree of declarator, how is the joint recording of it and of the original deed to be effected? 1. There is no provision in the Acts for recording separate deeds with one warrant, except in the case of unrecorded conveyances and assignments thereof. 2. On which of the writs is the warrant of registration to be written, or is there to be a warrant on each? In either case, as it must apply to all the parties, it will include some whose names do not appear *ex facie* of the deed on which it is written. If a notarial instrument be adopted, then (1) There is no provision for such an instrument on two deeds, except in the case of parties acquiring right to unrecorded conveyances, and there the title by which they acquired right must be set forth, which is quite inappropriate to the case of the original trustees; and (2) Even as regards the additional or new trustees, it cannot properly be said that they acquired right by assignment, because the maker of a deed cannot assign it (Gammell, 13th Nov. 1849, 12 D. 19); Act of 1858, §§ 13 and 14; Act of 1860, §§ 9 and 10. As it will generally not be desired to record the whole trust-deed, a notarial instrument will be most convenient where this mode of completing the title is adopted.

As has been seen, a trust-deed will receive effect though all the trustees predecease or decline to act (*supra*, Ans. 905), and it should seem that the same effect would follow though the truster were to cancel the whole nomination of trustees without substituting any others to act in their stead, provided the purposes of the trust are left subsisting. This, where only personal estate is concerned, is clear enough, but it has been contended that, as regards heritage, the deed must, on feudal principle, fail from the want of a valid *de presenti* conveyance to a disponent. Such, however, seems not to be the case, the deletion of the trustees being considered to leave the deed in the same position as if they had all died or declined to act, "the substantial disponent" being "the disponent having the interest, the beneficiary in the deed, the party who is to be favoured;" *per* Lord Ivory in the Royal Infirmary, *supra*. See also note by Lord Curriehill in Mackilligin, *supra*; Note by Lord Fullerton in Dundas, 27th January, 1837, 15 S. 427; Dickson's Evid. § 874, note 1.

but no direction,¹ or where there is an alternative direction to pay the proceeds or to divide,² the beneficiary's right will be heritable if the heritage is unconverted, and moveable if converted. (w) 3. Where there is a direction to convert the property into money, and divide the residue, the right is moveable.³ 4. Where the beneficiary's share has, with his sanction, been invested by the trustee on heritable security, it is heritable as to succession.⁴ (x)

910. Where the truster directed his trustees to pay the interest of the trust-funds to a party during his life, and after his death to purchase land for behoof of his eldest son, with instructions to accumulate the interest until a suitable investment should be found; Is the eldest son entitled to insist for payment of the interest?

The accumulation will be limited to one year, and the eldest son will be entitled to interest after the expiration of a year from the liferenter's death.⁵ (z)

¹ Cathcart, 26th May, 1830, 8 S. 808; Speirs, 21st Nov. 1850, 18 D. 81.

² Angus, 6th Dec. 1825, 4 S. 279.

³ Williamson, 15th Dec. 1849, 12 D. 372.

⁴ Burrel, 14th Dec. 1825, 4 S. 314.

⁵ Mitchell, 2nd Nov. 1853, 16 D. 1.

(w) But trustees are not entitled to exercise the power without the beneficiary's consent, unless there is a reasonable necessity for their doing so.

(x) It is to be understood that the fund is so invested, not only with the beneficiary's sanction, but in his own name; if it were in the names and subject to the control of the trustees, it would not be heritable as to succession. See Williamson, cited. There was some difference of opinion in that case, not as to the principle, but as to the import of the evidence of the beneficiary's intention to make the fund heritable. The principle is general, and applies to all similar cases of conversion of moveable property into heritable. See Davidson, M. 5597; Trotter, 5th Dec. 1826, 5 S. 78; H. of L., 3 W. & S. 407; Ramsay, 11th July, 1833, 11 S. 967.

(z) The rule can hardly be held to be so absolute as is here stated. The point to be ascertained is the testator's intention, which is to be done, in so far as it can be found, by looking to the leading and general purpose of the deed, and then seeing to what extent that is modified or controlled by the particular intimation of purpose in other clauses of the deed. In Mitchell (cited) the direction was to invest a certain sum of money "as soon as my said trustees find it in their power," and a year was held sufficient; but the Lord President (M'Neill) observed—"The Lord Ordinary says, that in such an event a reason-

911. Explain the operation of the Thellusson Act in regard to accumulations ?

The Thellusson Act annuls every direction, by will or other deed, to accumulate the annual proceeds of property longer than twenty-one years after the testator's death, or during the minority of a person living at the testator's death.¹ The statute excepted heritable property in Scotland, but the exception is repealed by the Entail Amendment Act.²(a) [Mackenzie, 4 R. 962 ; Smyth's Trustees, 7 R. 1176.]

912. What is the rule as to payment by the trustees of the truster's debts ?

The trustees, when not interpellated by diligence, are entitled to pay *primo venienti*, unless there is a manifest shortcoming of

¹ 39 & 40 Geo. III. c. 98.

² 11 & 12 Vict. c. 36, § 41.

able period must be taken, and that a reasonable period seems to be a year ; I can easily conceive a case in which it would not be a reasonable period, but in ordinary circumstances it is so ;" and Lord Ivory—"I am not prepared to gather out of the authorities referred to that there is an absolute rule applicable to such cases. The only general rule is that we are to be guided by the intention of the testator as to his object to be construed out of the words of the deed." See on this point, Stair, 19th June, 1827, 2 W. & S. 614 ; M'Pherson (H. of L.), 10th June, 1852, 1 Stu. 868, and Moncreiff, 25th Nov. 1857, 20 D. 94.

(a) Where a truster conveys the residue of his moveable, or of his heritable and moveable, estates, in a mass, upon a future contingency, the surplus income arising in the meantime falls into residue, and goes with the principal to the person ultimately entitled, and not to the truster's heirs *ab intestato* ; but the Thellusson Act renders all directions for accumulation of personal property beyond the term of twenty-one years inoperative, and therefore, where there is surplus income for a period beyond that term, there will be, in regard to the surplus income during the years over twenty-one, a resulting trust for the benefit of the next of kin ; Pursell, H. of L., 24th March (reported 13th June), 1865, 8 M'P. 59 ; varying, C. of S., 25th Nov. 1856, 19 D. 71.

Where a testator directed his trustees to pay his moveable estate to certain persons on the occurrence of any one of three contingent events, and after the lapse of thirty-three years from his death it became certain that none of these events could happen ; held that the testator died intestate, and that those entitled to the estate were the representatives of his heirs *in mobilibus ab intestato* at the time of his death, and not those who would have been his heirs when it became certain that none of the contingencies could happen ; Lord, 15th July, 1865, 8 M'P. 1083.

funds, in which case they are not safe to pay without a multiple-pounding.¹(b)

913. When the trustees are directed to pay the residue, under burden of an annuity; What are the respective rights of the residuary legatee and the annuitant, the other purposes of the trust being fulfilled?

The residuary legatee is entitled to payment of the residue, and all that the annuitant can demand is a personal bond of annuity from the residuary legatee, without any security.²(c)

914. When the residuary legatee is to be burdened with an annuity; What relative provisions ought the trust-deed to contain?

The annuity ought to be declared a real burden on part of the heritage; or there should be a direction to the trustees to purchase for the annuitant an annuity from a life assurance company.

915. May the trustees make up titles or sell without express power? State the reasons.

(1.) The trustees may make up titles without express power; because that is an act of ordinary administration, and necessary for carrying out the purposes of the trust.³

(2.) They cannot sell heritage without power, either express or necessarily implied [or granted by the Court. See Ans. 902]; because sale is an extraordinary act, and the heir cannot be excluded by inference.⁴(d) Without express authority they may

¹ Rankine, M. 16201; Bell's Prin. 1998.

² Kerr, 12th Feb. 1858, 20 D. 562.

³ Menzies Lect. 679 (714).

⁴ Robertson (7th March, 1832, 10 S. 438), 1st Sept. 1835, 2 Sh. and MacL. App. 333 (3 S. & M'L. 311).

(b) Rankine, cited, was a case of trust for creditors. Testamentary trustees, like executors, as they also generally are, cannot pay with safety till after the lapse of six months.

(c) But if the party is "insolvent or *vergens ad inopiam*, then the law provides machinery for obtaining security;" per Lord Curriehill in Kerr (cited). In that case the bonds were offered, and therefore the question of right to demand them did not arise.

(d) It is not very obvious what connection there is between the exclusion of the heir and the question of the power of the trustees to sell, which may

sell (1) where there is a running deficiency of funds which would consume the trust-property ;¹ or (2) where the primary purpose of the trust is the payment of the truster's debts, and that purpose cannot be implemented without a sale.²(e) It is thought that the trustees may sell moveables without express authority.

[916. When trustees have under the trust-deed, or receive from the Court, power of sale, what are the provisions of the Trusts Act, 1867, as to its exercise ?

(1) It may be either private or by public roup, unless otherwise specially directed by the trust-deed, or the Court, or the deed of consent by the beneficiaries ; (2) where the estate is heritable a feu-duty or ground-annual may be reserved ; (3) minerals may be reserved, § 4.]

917. A trust-deed authorised the trustees to assume additional trustees to act along with them, "in place of those who may die or decline to act," and two of the trustees having died, an assumption of three new trustees was made ; Was the appointment valid to any extent ? State the reason.

Not only is the assumption of three trustees *ultra vires*, but the nomination is entirely void ; the principle being, that faculties are of strict construction, and must be precisely executed ; and that in this case, the transgression of the power being inherent in the whole act itself, the Court will not interfere to make a new act in exercise of the power.³(i) [See in support of note (i), Allan, 5 R. 576.]

¹ Henderson, 22nd June, 1841, 3 D. 1049.

² Graham, 21st Dec. 1850, 13 D. 420.

³ Ferrie, 31st May, 1834, 12 S. 672.

arise where the exclusion of the heir is absolute and undoubted. In Robertson, cited, the question was, whether a particular subject was conveyed to the trustees to be dealt with in terms of the provisions of the deed, or fell as *intestate* succession to the heir-at-law, who was excluded by the deed.

(e) But it may be necessary in some cases to get the authority of the Court. See Lord Moncreiff's note to his interlocutor in Campbell's Trs., 6th Dec. 1838, 1 D. 153.

See as to purchases of the trust-estate by trustees, *supra*, Ans. 136, note (u), p. 69.

(i) Probably, where the deed contains special powers of assumption, they will supersede and control the general power in the Act of 1861, as bringing into operation the proviso "unless the contrary be expressed."

918. In what cases are trustees personally liable, although protected by the usual clause of immunity from liability for omissions, intromissions, &c.

They will be liable (1) for the misapplication, by any of their number, of money for which they have granted a receipt or discharge;¹ (2) for positive transgression of the testator's instructions;² (3) for erroneous payments;³ (4) for expenses of *mala fide* litigation;⁴ (5) for gross negligence or fraud.⁵(*k*) [See as to the statutory clause of immunity, Ans. 900.]

919. Does a factor *loco tutoris*, or a judicial factor on a lapsed trust, require to make up titles in his person before granting a conveyance of the heritage?

(1) A factor *loco tutoris* does not require to make up titles where a title has been completed in the person of the ward; because he comes as guardian in place of the ward, and exercises his will or consent;⁶(*l*) (2) but a judicial factor on a trust-estate must make up titles, because the title is an abeyance.⁷

920. How does a judicial factor on a trust-estate obtain a real right to the lands?

[(1.) Under § 24 of the Consolidation Act where, in the petition to the Court of Session for the appointment of a judicial factor, authority is asked for the completion of a title by the factor to lands forming the whole or part of the estate to be managed by him, or where the factor applies to the court by petition or note for authority to complete a title, and if the

¹ Blain, 28th Jan. 1836, 14 S. 361.

² Morrison, 9th Feb. 1827, 5 S. 322; Bon Accord Marine Ins. Co., 11th Dec. 1850, 13 D. 295.

³ Macfarlane, 12th May, 1835, 13 S. 725; Macpherson, 19th Jan. 1850, 12 D. 486.

⁴ Robertson, 4th Dec. 1823, 2 S. 553; Kay, 6th March, 1850, 12 D. 845.

⁵ Menzies Lect. 686 (722).

⁶ Scott, 21st Feb. 1856, 18 D. 624.

⁷ Meikle, 4th June, 1856, 18 D. 988.

(*k*) See *supra*, Ans. 258, and note (*b*), as to liability of trustees in other respects.

(*l*) What is here stated is correct, but it is not to be understood that if a title has not been completed in the person of the ward one is to be made up in the person of the factor. The title must be made up in the person of the ward. See as to powers of factors *loco tutoris*, *supra*, Ans. 78 *et seq.*, and notes.

application describes or validly refers to the lands, the warrant granting authority to complete the title is also to describe or refer to the lands. The Act goes on to provide that such a warrant is to be held to be a conveyance in common form in favour of the factor granted by the person, whether alive or deceased, whose estate is under his management, or where the factor is appointed on an estate which has been vested in a trustee or former factor, the warrant is to be held to be a conveyance by such trustee or former factor, whether alive or deceased, and that the warrant may, with warrant of registration thereon, be recorded in the appropriate Register of Sasines as a conveyance to the factor, and, being so recorded, is to have the same effect as if, at the date of the recording, such a conveyance had been granted to the factor and duly recorded. Under this enactment the factor can apparently record the warrant even if the title to the lands stood previously on a personal right.

(2.) The Conveyancing Act, § 44, provides that when a trust-title has been duly completed and recorded, and any person is subsequently appointed by the Court to administer the trust in whole or in part as a trustee or judicial factor, the interlocutor making the appointment is to specify the trust-deed and the titles (if any) by which the trust-title had been completed, and refer to the Sasine Registers where the trust-deed or titles are recorded, and also describe or refer to the lands. An extract of this interlocutor, when recorded in the appropriate Sasine Register, is to operate a title by infestment in favour of the trustee or factor so appointed, in the same way as if he had been a trustee named in the completed and recorded title. This answer is altered from that in the last edition.]

V. LEGACIES.

921. Are verbal legacies effectual?

(1) Verbal legacies are valid to the extent of £100 Scots, as obligations to that amount are proveable by witnesses.^{1(s)} (2)

¹ Ersk. 3, 9, 7.

(s) A nuncupative legacy sustained to the extent of £8, 6s. 8d., though nominally a legacy to a larger amount; Kelly, 8th March, 1861, 23 D. 703.

Where the executor has right to the residue, and has promised to the defunct to pay certain legacies, it has been held that these are proveable by his oath, although exceeding £100 Scots.¹(t) (3) But beyond that amount such legacies cannot be sustained if the executor has no personal right to the residue.²

922. What is the effect of (1) a legacy bequeathed for a reason erroneous in point of fact; and (2) of error in the name of the legatee?

(1) A legacy bequeathed for a reason erroneous in point of fact, is nevertheless effectual; because a statement of the cause or reason for granting conveyances *mortis causa* is not essential to their validity.³ But error in the narrative will vitiate the legacy if it can be proved that, had the testator been correctly informed, he would not have left it.⁴(u) (2) Error in the name of the legatee will not vitiate the legacy, "*dummodo constet de persona*, provided his description distinguishes him sufficiently from all others."⁵ [Macfarlane's Trustees, 6 R. 288.]

923. What is the effect of *legatum rei alienæ*?

(1) If the testator knew that the subject bequeathed was not his own, the legacy is valid to the effect of obliging his executor to purchase it for the legatee, or to pay him its value. (2) But if the testator erroneously believed it to be his own, the legacy is

¹ Hannah's Legatees, M. 3837.

⁴ Grant, 9th July, 1846, 8 D.

² Forsyth's Trs., 18th Jan. 1854, 16 D. 343.

1077.(u)

³ Ersk. 3, 9, 8.

⁵ Ersk. 3, 9, 8; Keiller, 15th Dec. 1824, 3 S. 396, and 16th June, 1826,

(t) This is on the principle that the executor is a trustee, and his oath is admissible to prove the condition of the trust. Where, without making any written testament, a person declares his will to his next of kin, such declaration, though admitted, imports no obligation on the next of kin, unless he had consented to it; Smiths, M. 6594.

(u) In Grant (cited) the question was not as to a bequest, but as to a revocation of one, as was also the prior case of Speirs, 18th Dec. 1829, 8 S. 268, where the authorities will be found collected, and where Lord Newton stated that this exception to the general rule, "that a false cause does not vitiate a legacy," operates "only in the case where it appears certain that, had the testator known the truth, he would not have left the legacy."

void, the presumption being that he would not have burdened his legal representative if he had known that the subject bequeathed was not his property.¹ [Traquair, 11 M'P. 22.]

924. What is the effect of a legacy of an heritable subject?

(1) A legacy of an heritable subject is regarded as *legatum rei alienæ scienter legatae*, and will be effectual against the executor or residuary legatee, on the principle of approbate and reprobate.²(x) (2) But where the testator's heir-at-law is appointed executor, a legacy will not burden the heritage descending to him as heir, if he do not take benefit under the testament, or if the deed give him no benefit.³ (3) Where the testator erroneously believed the subject bequeathed to be moveable, the executor is not obliged to make good the legacy, as he is not bound in warrandice.⁴ [Heritage can now be bequeathed by a testamentary writing sufficient to give a right to moveable estate, Consolidation Act, § 20.]

925. What is the *legatum liberationis*, and what is its effect?

The *legatum liberationis* is a legacy of all that the legatee may be due to the testator at his death. It effectually discharges all proper debts due by the legatee in his own right to the deceased, but it does not free him from accounting for funds received on the testator's account, or otherwise than by loan.⁵

926. What is a universal legacy; and would a bequest of a person's "whole moveable goods, gear, and effects" be a legacy of that description?

A universal legacy is a bequest of the whole moveable property of the deceased, excepting heirship-moveables. [Heirship-

4 S. 724; Dent, 6 Mad. 350, Ch. Rep.; Doe, 4 Barn. & Ald. 57, K.B.

¹ Ersk. 3, 9, 10; Bell's Prin. 1884.

² Dundas, 14th Jan. 1829, 7 S.

241; aff. 22nd Dec. 1830, 4 W. & S. 460.

³ Ersk. 3, 9, 10.

⁴ Ersk. *ib.*

⁵ Graham, M. 8108.

(x) The same rule holds in the case of legacies payable out of proceeds of heritable subjects; Catto, M. 8076.

moveables were abolished by the Consolidation Act, § 160.] A bequest of a person's "whole goods, gear, and effects," is not sufficient to constitute a universal legacy, as the words used are of restricted application, applying only to *corpora mobilia*, and not including *nomina debitorum*.¹ [See, as to construction of word "money," *Easson*, 7 R. 251; *Dunsmure*, 7 R. 261.]

927. A party conveyed by settlement the *universitas* of his estates, heritable and moveable, for division among A, B, and C, declaring that if any one of them impugned the deed, he should forfeit his share. A, the testator's heir-at-law, reduced the settlement and forfeited his third; Did A's third accresce to B and C?

Yes; it being held that the forfeiture was intended by the testator for the benefit of the remaining legatees, and not for the benefit of the next of kin, who had no interest under the settlement.²(y)

¹ *Ersk.* 3, 9, 11; *Earl of Fife*, M. 2325.

² *Nisbet's Tra.*, 6th Dec. 1851, 14 D. 145.

(y) It is hardly possible to suppose such a case as this occurring, because if A reduced the settlement he would necessarily carry off part of the estates, after which his *entire* share of the succession under the deed could not remain to accresce to any one. Accordingly, it will be seen, on referring to the case of *Nisbet's Tra.*, here cited, that the circumstances were not quite the same as those put in this question. The heir who challenged had no interest under the deed, which was in favour *inter alios* of his children, and contained a declaration that if he should impugn it he should, "not only for himself, but also for his children, *ipso facto* forfeit all interest" under it. The effect of the challenge was to carry off more than had been intended for his children, and leave less than had been intended for the other beneficiaries, and this was stated as one of the grounds of his opinion by Lord Fullerton, who observed that the repudiation of a settlement "will not confer on any party a benefit not contemplated by the settlement, *at the expense of the parties whose interests have been diminished* by the challenge of the settlement occasioning the forfeiture." Had the effect been to leave more than two-thirds of the estate (as might be the case if the heir chose to take the heritage, though less than what was intended for his children), the result of the case (*Nisbet*) might have been different. It is difficult to conceive the heir, where himself a beneficiary, challenging in such circumstances as have now been supposed; but if he did challenge, the surplus might not, in the absence of any direction to that effect, go to the other beneficiaries, but might become intestate succession, leaving to them only the shares appropriated to them by the testator.

928. What is a general legacy, and what is the nature of the right which it confers?

A general legacy is that by which a certain sum of money is bequeathed without mentioning any particular fund out of which it is to be paid. Such a legacy gives no *jus in re*, but only a claim or right of action against the executor, who is liable for the sum if the free executry in his hands be sufficient for satisfying it.¹

929. What is a special legacy, and what is the nature of the right which it confers?

A special legacy is a bequest of a particular subject, fund, or debt, distinguished by special description from the rest of the testator's moveable estate. Being of the nature of a conveyance, a special legacy gives the legatee a complete right to the subject on the death of the testator, so that action is competent at his instance for its recovery.²

930. A testator left the following legacies:—To A, £500, contained in Z's bond, and to B and C, £250 each; and his free executry, after payment of debts, amounted only to £900; How will the executry be divided among the legatees?

A's legacy, being special, is not affected by the inadequacy of the fund; and he therefore takes the £500 bond without abatement. But the legacies of B and C, being general, suffer a rateable abatement; and these legatees therefore receive only £200 each.³

931. Must a special legatee call the executor, in an action for recovery of the subject bequeathed, when it is in the hands of a third party? State the reason.

Yes; because the creditors of the testator are preferable to special legatees, and the executor must be called in order that it may appear whether there is a sufficiency of funds, exclusive of the special legacy, for payment of the testator's debts.⁴

¹ Ersk. 3, 9, 11.

² Ersk. *ib.*

³ Ersk. 3, 9, 11; Bell's Prin. 1876, 1877.

⁴ Ersk. 3, 9, 11; Forrester, M. 2194.

932. Would a legacy of a personal bond be extinguished if the debtor voluntarily paid it up during the testator's life; or if the testator executed a posterior general disposition and settlement of his whole property?

(1) The legacy would be held to be annulled or adeemed if the bond were voluntarily paid up during the testator's life.¹ (2) A general disposition and settlement does not operate as a revocation or extinction of a special legacy of prior date, the settlement being held to be made under burden of the legacy.^{2(z)}

933. Where the testator has sold a house, which he had previously disposed of by his settlement, Is the donee entitled to the price as a *surrogatum*?

No; because a bequest is held to be adeemed or revoked if the subject has been conveyed away before the testator's death.³ [See Stainton's Tra., 6 M.P. 240 as to effect of sale of heritage by trustees, in error as to amount of moveable estate.]

934. A party who had made a special legacy of a moveable bond afterwards took heritable security for the debt; Was the legacy thereby revoked?

It has been held that, by the testator taking the supervening security, the legacy was revoked;^{4(a)} but it is to be observed, as is

¹ Weir, M. 11859; Drummond, M. 11873.

² Chalmers, 19th Nov. 1851, 14 D. 57.

³ Thomson, 18th Nov. 1836, 15 S. 32.

⁴ Paul, 5th July, 1821, 1 S. 100 (104).

(z) This is hardly a correct statement of the law. The circumstances in the case of Thomson were strongly indicative of the testator's intention not to revoke, but even there the judges expressed difficulty in coming to the decision which was given. The rule can scarcely be absolutely stated. In the words used by Lord President Hope in the case of Thomson—"Everything depends on the circumstances and on the intention of the parties, so that there is scarcely any one of this class of cases which can be quoted as a precedent to another." See observations per Lord Curriehill in Collow's Tra., 23rd Feb. 1866, 4 M.P. 465.

(a) The rule here stated, and adopted in Paul (cited), is laid down by Erskine (3, 9, 10). The effect might be prevented by a declaration that, though heritable security should be taken for the debt, its amount shall constitute a claim against the executry, but this would convert the special legacy into a general one. The case of Tullochs (quoted, note 1, p. 436) does not seem to bear on this point.

remarked by Mr. Duff, "that as the testator must be presumed to be aware of the change, he is, by preserving his settlement unaltered, in effect bequeathing a special subject, knowing it to be heritable."¹

935. Where a legacy has been made to A and B, or to A and B jointly, or jointly and severally, or to A and B equally; What is the effect if one of the legatees predecease the testator?

(1) In a legacy to A and B, or to A and B jointly, or jointly and severally, the survivor takes the whole legacy. (2) In a legacy to A and B equally, the survivor has only his own share, the *jus accrescendi* being excluded.²

936. In legacies to A in liferent and to B in fee, and to A in liferent and, after his death, "the legacy to be divided equally between B and C, or the survivor of them;" Have B in the one case, and B or C in the other, the power of testing on the legacies respectively after the death of the granter, but during the life of the liferenter?

(1) In a legacy to A in liferent and B in fee, the latter may validly assign or bequeath the fee during the liferenter's life, as it vested in B by his surviving the testator.^{3(c)} (2) But where the fee is to be divided after the liferenter's death "between B

¹ Duff on Deeds, 101; Tullochs, 23rd Nov. 1838, 1 D. 94.

² Turnbull, M. 8099; (b) Forbes, 26th Jan. 1838, 16 S. 374.

³ Bell's Prin. 1882; Rose, M. 8101; Torrie, 31st May, 1832, 10 S. 597.

(b) A legacy to a parent in liferent and children in fee, without the intervention of a trust, vests fee in parent; Williamson, 28th June, 1828, 6 S. 1035, overruling, on this point; Turnbull, *supra*, which will be found more fully reported, M. 4248; Ferguson's Trs., 13th July, 1860, 22 D. 1442.

(c) This is the general rule in the case put; but in Duncan, &c. (Croom's Trs.), 30th Nov. 1859, 22 D. 45, it was held that under the special terms of the deed, though the legacy had vested, the party could neither test on nor assign it. Since then, however, the case of Donaldson's Trs. has been decided in the House of Lords, 14th Feb. 1862, 24 D. 1, and the principle there adopted might lead to a different view as to the period of vesting in such a case as that of Duncan, &c.

and C, or the survivor of them," neither of them has power to test or assign(*d*) before the end of the liferent, as the terms of

(*d*) In reference to the power to assign or test, a distinction must be observed. If the legatee assigning or testing die before vesting takes place, the assignation or settlement will be ineffectual (Newton, cited *infra*, note 1, p. 438 ; Mitchell, 17th March, 1865, 3 M'P. 721) ; but if he survives the vesting, it will be effectual ; Fyfe's Trs., 20th March, 1862, 24 D. 925. It was there observed by Lord Kinloch, in a note to his judgment—"It is not necessary to assign-ability that a right should have vested at the date of the assignment. A right *in spe* may be validly assigned." There may sometimes be difficulty, however, in completing the right by intimation, so as to secure a preference in competition.

In Croom's Trs. (*supra*, note (c), Ana. 936) it was held that a legatee whose share of the trust-estate had vested, but had not become payable, had no power to test on the share. In a subsequent case, where a testator directed his trustees to pay or convey the residue of the trust-estate, after the death of the last liver of himself and his wife (who had under the deed a power of testing on a portion of the estate), to and among three grand-nephews and three grand-nieces therein named "equally share and share alike, and to their respective heirs or assignees, declaring that if any of the residuary legatees shall die without leaving lawful issue, before his or her share vests in the party or parties so deceasing, the same shall belong to and be divided equally or share and share alike among the survivors of my said grand-nephews and grand-nieces equally," and all the residuary legatees survived the testator, but two of them predeceased his wife ; it was held by a majority of the whole Court, that the shares of the two deceasing residuary legatees had vested *a morte testatoris*, and were carried by their respective settlements ; Donaldson's Trs., 20th July, 1860, 22 D. 1527. On appeal, however, the judgment was altered in the House of Lords, and it was held that the period of vesting was coincident with the period of payment, and therefore that no right had vested in the predeceasing residuary legatees (reported under Richardson) ; H. of L., 14th Feb. 1862, 24 D. 1. It was here observed by Lord Chancellor Westbury that "it was a settled rule of construction, and had been so earlier in Scotland than in England, that words of survivorship in a *mortis causa* settlement should be referred to the period appointed for the payment or distribution of the subject-matter of the gift. If a testator gave a life estate in a sum of money, or in the residue of his estate, and at the expiration of that life estate directed the money to be paid, or the residue divided, among a number of persons, and then referred to the possibility of one or more of those persons dying, without specifying the time, and directed, in that event, the payment or distribution to be made among the survivors, the survivors were to be ascertained by reference to the period of payment or distribution—viz., the expiry of the life estate." See to the same effect, Mitchell, *supra*, and Laing, 20th July, 1865, 3 M'P. 1143. These cases may be contrasted with Hunter's Trs., 11th Feb. 1865, 3 M'P. 514, where, under a conveyance to trustees for behoof of "A in liferent and her children in fee, to be kept in trust by them till they in their discretion

the bequest are such as to confer no vested right until the life-renter's death.¹

937. Where a legacy was made to A, payable at the death of the longest liver of the testator and his wife; Was it carried by A's testament, he having survived the testator, but predeceased his wife?

Yes; because such a legacy vests, if the legatee survive one of the spouses.²(f)

938. Does the testament of a legatee carry a legacy bequeathed to him, and his heirs, executors, and assignees, he having predeceased the testator?

No; because the legacy had not vested in the legatee, the term "executors," importing executors by law merely, and not executors by express appointment; and the term "assignees" meaning only that the legatee might assign the legacy when it became vested in his person. It transmits to his next of kin in their own right, as conditional institutes.³

939. Where a bond of provision to a child, or a legacy, is conceived in favour of the grantee and his heirs; What will be the effect if the grantee predecease the granter?

¹ Newton, 27th Jan. 1849, 11 D. 452; Robertson, 28th May, 1858, 20 D. 989.

² Wallace, 28th Jan. 1807, M. App. "Clause," No. 6; Stirling, 12th Nov. 1851, 14 D. 20.

³ Graham, M. App. "Legacy," No. 3; Henry, 19th Feb. 1824, 2 S. 725; Lawsons, 24th Jan. 1826, 4 S. 384, 2 W. S. 625.

shall see proper to settle it in the most safe and secure manner on her and her children," it was held that there being no survivorship clause, and no term of payment involving *dies incertus*, the provision vested *a morte testatoris* in the then existing children, and in each child subsequently born at its birth.

(f) The reason here given would not always hold. Had A survived the wife, but predeceased the testator, the legacy would have lapsed.

Where a legacy was left by two persons in a joint settlement, and one predeceased, and the other survived the legatee; held that the legacy did not lapse; Nicolson, 16th Dec. 1806, F.C., M., "Legacy," App. 2. See Wilson's Tra., 13th Dec. 1861, 24 D. 163.

(1) A bond of provision to a child, though conceived to his heirs, lapses by the child's predeceasing his father, the substitution of heirs being conditional upon the vesting of the provision.^(g)
 (2) But a legacy to the legatee and his heirs does not fall by his predecease, but belongs to his next of kin, as conditional institutes.^{1(h)} [This rule is general, but not invariable; Findlay, 2 R. 909.]

940. A legacy was made to A of £100, "and which sum the said A shall distribute among her daughters at her death as she shall think fit;" and A predeceased the testator; Had her daughters right to the legacy?

No; it having been held that these terms imported no right in the daughters under the settlement, but an absolute fee in A which lapsed by her predecease.²⁽ⁱ⁾

¹ More's Notes, 344.

² Scots, M. 8090.

(g) So held, Russell, 10th March, 1769, F.C.; but if the child, though predeceasing the father, leaves issue, they are entitled to the provision; *supra*, Ans. 881.

(h) A case recently occurred forming an exception to this rule. A truster directed an heritable subject, in the event of A having no lawful issue, to be disposed to B, "and his heirs and assignees, and that on his attaining the age of twenty-one years complete." B died in minority, survived by A. Held that, B not having attained twenty-one, and before it could be ascertained whether or not A would leave lawful children, the subject had not vested in either B or his heirs, and that it passed into residue; Donald's Trs., 26th March, 1864, 2 M'P. 922.

(i) The case of Scots (cited) may be contrasted with the two following cases:—(1) Where a fund was conveyed to A in liferent, with power, in the event (which happened) of her leaving no issue, to "settle, destine, and convey" it as she should think fit; held that this conferred on her a mere faculty, and gave her no right of fee; Morris, 7th June, 1853, 15 D. 716. (2) A testator appointed his trustee to pay to A the interest of £2000, and, at her death, the principal sum to devolve on her children, and failing children, on the testator's heirs. In a codicil he said, in reference to that direction—"I reverse that clause, and hereby commit to her discretion alone, as she may see cause, the sole and ultimate disposal of £2000." Held that this conferred only a faculty, and not a fee; Pursell, 25th Nov. 1856, 19 D. 71; H. of L., 19th June, 1865, 3 M'P. 59. In this case Lord Chancellor Westbury drew a distinction between a power given to a person who is, and one given to a person who is not *sui juris*, and observed—"If I give an estate to A B" (he being *sui juris*), "to do therewith as he pleases, to give to such persons as he shall think fit," &c.; all these expressions are nothing more than a form of denoting absolute

941. A legacy was made to A, to be held and enjoyed by him and his heirs and assignees, and A predeceased the testator; Had his heirs right to the legacy?

Yes; this having been considered as a conditional institution of the heirs.¹(k)

942. Legacies were made to A, "to be paid when he is sixteen years of age," and to B, payable "if he shall attain the age of sixteen;" and both legatees survived the testator, but died before the specified age; Had the legacies vested in either of the legatees?

(1) The legacy to A had vested, because the uncertainty of time attached only to the term of payment, and not to the legacy;²(l) (2) But B's legacy had not vested, because the

¹ E. of Moray, M. 8103.

² Burnets, M. 8105.

ownership." "But if a gift is made to a *femme covert*, and provision is made for her children, and then these words are annexed to the gift, that in the event 'of her having no children, the property is committed to her discretion alone;' these are words which, having regard to the reference to her discretion, and to the cause for the exercise of that discretion, and to the fact that they are annexed to a gift made to a *femme covert* who is not *sui juris*, must I think, be held to amount only to an indication of intention" that she shall have a power of appointment or disposition, and not that she shall become the absolute owner.

Where £10,000 were conveyed to trustees, with directions to pay the annual income thereof, and such part of the capital as they should see fit, to B, for his aliment, and on his death to pay the residue to such persons as he should have appointed by a *mortis causa* and revocable deed; B having become bankrupt, and died, leaving a will in favour of his daughter; *opinion*, that the faculty did not empower him to leave the £10,000 to his creditors; Colville, 21st Nov. 1862, 1 M'P. 412.

(k) Trustees were directed to make over £1000 to A, declaring that the same should not be subject to the *jus mariti* of B, her husband; "and in the event of B surviving his wife, he shall be entitled to enjoy the interest of the said sum during his life, and that upon his death it shall go to the issue of his wife, which declaration my said trustees are requested to carry into effect." A and B predeceased the testatrix; held that their issue had right as conditional institutes to the legacy; Sutherland, 20th Nov. 1865, 4 M'P. 105.

(l) Burnets, cited, is not of authority. See *contra*, the later case of Sempills, M. 8108, where legacies directed to be paid "at and against the next legal term after their attaining to their respective ages of twenty-one years complete"

uncertainty attaches to the legacy itself, in which cases *dies incertus pro conditione habetur*.¹

943. A legacy was left by a person to A, his son (without mention of heirs), whom failing, to B. A predeceased the testator, leaving issue, Whether did the legacy belong to A's issue or to B?

The legacy belonged to A's issue; because in legacies by a parent to a child, there is implied a conditional institution in favour of the child's issue, and the substitution is held to be made under the condition *si sine liberis decesserit*.²

944. A legacy was left to A, whom failing, to B; and another legacy to a trustee for behoof of C, and failing him, for behoof of D; and A and C both survived the testator; Whether did the legacies belong to heirs of A and C respectively on their death, or to B and D?

(1) The legacy to A, whom failing, to B, belonged to A's

¹ Omev, M. 6840; Menzies Lect. 478 (497).

² Mags. of Montrose, M. 6398; Neilson, 4th June, 1822, 1 S. 458.

were held to have lapsed by the death of the legatees in minority, though they had survived the testator; and Home, 28th Jan. 1807, Hume, 530. This was a case of provisions to children, "the one half of which sums shall be due and become payable at their respective majorities or marriages, which of these events shall first happen, and the other half at the first term after the decease of their mother." The child died minor and unmarried. Observed by Lord President—"One half of it clearly lapsed, being left pendant on the condition of majority or marriage, which never arrived. The case of Burnet (*supra*, note 2, Ans. 942) was ill decided; so the judges themselves came afterwards to think." "As to the other half, I think it vested in the child, though suspended in point of payment till the mother's death, which is a *dies certus* which will happen, though uncertain when." It would therefore appear that legacies payable at majority or a particular age do not vest till the time fixed for payment. A different rule, however, has been followed, where though the legacy is made payable at majority, there is a direction to pay interest on it *a morte testatoris*, or otherwise to give the legatee a benefit from it before the term of payment. In this case it has been held that vesting takes place immediately on the death of the testator, so as to render the legacy transmissible to the representatives of the legatee; Kennedy, 20th July, 1841, 3 D. 1266; Ralston, 8th July, 1842, 4 D. 1496; Matthew, 21st Feb. 1844, 6 D. 718.

heirs ; B being regarded as merely a conditional institute, and his right being evacuated by A's survivance.¹ (2) But the other legacy belonged to D, and not to O's heirs, the evacuation of the substitution being prevented by the trust.²(*m*)

¹ Fyffe, 13th July, 1841, 3 D. 1205.

² Duncan, 27th June, 1809. F.C.

(*m*) It is assumed in this answer, though not stated in the question, that neither A nor C had received payment of their legacies,—a circumstance which, where the institute has during his life done nothing to defeat the substitution, may have very important effects ; but the rule stated in the answer is not to be relied on. A substitution has received effect where there was not (Macdowall, 19th June, 1847, 9 D. 1284) as well as where there was a trust (Duncan, cited), and has been defeated notwithstanding of there being a trust (Fyffe, cited). In Macdowall, where parties named as executors did not act, the institute had uplifted and, by reinvestments, merged with her own the whole funds, except one bond, which was payable to the testator, his heirs, executors, or assignees, but of which she received the interest for many years, and she died intestate. Held that the substitution had been evacuated as to all the funds except that bond, in regard to which it was effectual, and which accordingly went to the substitutes named in the settlement. The real difference between the cases of Duncan and Fyffe was not that stated in the answer, but that in Duncan the institutes died intestate, while in Fyffe the institute, who was confined in a lunatic asylum at Calcutta, and survived the testator (who died in Scotland) only one day, had previously to his insanity made a will, which was held to have defeated the substitution (apparently in opposition to Campbell, M. 14855). In Duncan the legacy was burdened with two liferents, and there was a destination over to the heirs or assigns of the substitute. The institute survived both liferenters, and also the substitute, and had been called in a process of multiplepoinding brought by the trustees, but died intestate during its dependence. A competition then arose between their heirs and those of the substitute, who were preferred. In the report of the opinion of the Court, it is stated that the legacy “ had never vested in ” the institutes, and the case was distinguished in that respect from Brown (see note (*m*), Ans. 884). According to the rule laid down in House of Lords in Donaldson's Trs. (*supra* note (*d*), Ans. 936), it is thought that vesting had taken place, and that the institutes had acquired, not only *jus crediti*, but *jus exigendi*. It does not appear whether they had lodged a claim in the multiplepoinding, but if they had, that might have made a difference, as being equivalent to payment, See *supra*, Ans. 884, note (*m*), and Brown, there cited, M. 14863, and Bell's 8vo cases, 310. There seems to be no doubt, however, that anything equivalent to payment or actual possession of the subject, or (vesting being presumed) a will or assignation, will, notwithstanding a trust, evacuate a substitution. See Ramsay's Trs., 23rd Nov. 1838, 1 D. 83, and Allan, 20th June 1845, 7 D. 908. In this last case an unsuccessful attempt was made to have the substitution inserted in the conveyance to the institute, in reference to which the Lord Justice-Clerk Hope observed—“ When trust funds are to be

945. May a clause of return be gratuitously defeated?

(1.) If the conveyance or grant containing the clause of return is onerous, it may be gratuitously defeated.

(2.) In a gratuitous conveyance to a stranger, a clause of return is regarded as a condition of the grant, and the donee cannot gratuitously disappoint the return.

(3.) Where there is a series of substitutes, the clause of return, although the conveyance is gratuitous, may be defeated by the institute, or any of the substitutes but the last.

(4.) If the clause of return is not to the grantor, but to a third party, it may be defeated gratuitously, as it resolves into a substitution.¹ [Buchanan, 6 M'P. 536.]

VI. ENTAILS.

946. What is meant by an entail?

Entails, in a general sense, comprehend "all destinations in which the legal course of succession is altered or cut off, and one or other of the heirs-at-law excluded or postponed."² But in the strict acceptation of the term, and keeping out of view certain statutory relaxations, an entail not only limits the succession to a specified series of heirs, but so secures the estate against their acts and deeds as to transmit it entire and unencumbered until the destination is exhausted.

947. Enumerate the different kinds of entails, and state the effect of each.

Mr. Erskine divides entails into three classes, viz. :—

(1.) Entails with simple destinations to a series of heirs, but without any prohibition against altering the order of succession.—

¹ Ersk. 3, 8, 45; Bell's Prin. 1705; ² Ersk. 3, 8, 21.
Duff's Entails, 26.

divided and paid over," "no substitution or destination is to be presumed after the trust is at an end, and where there are no means of protecting such destination."

If the trustees were *in mora* in paying over the fund after the term of payment had arrived, this would probably have the effect of evacuating the substitution.

Such destinations receive effect so long as they are not altered; but they may be altered gratuitously.

(2.) Entails with prohibitory clauses.—Entails of this kind were effectual to prevent the heir in possession from granting gratuitous deeds to the prejudice of the substitutes; but they had no effect against onerous deeds.

(3.) Entails with prohibitory, irritant, and resolute clauses, effectually protecting the succession of the estate against the acts and deeds, whether onerous or gratuitous, of the heir in possession, so that neither he nor his creditors can in any way affect the fee of the estate, except according to certain statutory provisions.

As entails with prohibitions but without irritant and resolute clauses are not valid and effectual in terms of the Act 1685, they are held, under the 43rd section of the Entail Amendment Act, 1848, to be a fee-simple title, and therefore the estate is subject to the debts and deeds of the heir in possession.¹ Accordingly, there are now only two kinds of entails:—(1) simple destinations; and (2) strict entails.

948. What are the provisions of the Act 1685, c. 22, anent tailzies?

(1.) That it should be lawful to the lieges to tailzie their lands and estates, and to substitute heirs in their tailzies, with such conditions and provisions as they think fit; and to affect the tailzies with irritant and resolute clauses, whereby it should not be lawful for the heirs, 1st, to sell the lands; or 2nd, to contract debt; or 3rd, to alter the order of succession. Such acts are declared null; and, upon contravention, the next heir may pursue declarator, and serve himself heir to him who died last infest, and did not contravene without the necessity of representing the contravener.

(2.) That the prohibitory, irritant, and resolute clauses be inserted in the investiture, and repeated in the subsequent renewals.

(3.) That the entail be recorded in the Register of Entails.

(4.) That the omission to insert the fetters should import a

¹ Ferguson, 18th Nov. 1852, 15 D. 19.(n)

(n) See also Dick Cunyngham, 9th March, 1852, 14 D. 636; and Dewar, 20th July, 1852, 14 D. 1062.

contravention of the irritant and resolute clauses against the person and his heirs, who should omit to insert the same, whereby the estate should *ipso facto* fall, accresce, and be devolved to the next heir of tailzie; but should not militate against creditors, or purchasers who should have contracted *bona fide* with the person who stood infeft in the estate without the irritant and resolute clauses in the body of his right.

(5.) The rights of the Crown and of superiors for their casualties are reserved entire.

949. A, having a personal right by disposition containing a procuratory of resignation for resigning the lands in fee-simple, executed a disposition and deed of entail in favour of himself and B, and a series of substitutes. After A's death, B made up a title under the entail by charter of resignation from the superior, proceeding on the unexecuted procuratory in favour of A, transmitted to B by the assignation to writs in the deed of entail and by the decree of general service; Was the entail duly constituted?

Yes; as it is not essential that the title of the maker of an entail should be feudalised, it being competent in the constitution of an entail to use unexecuted precepts or procuratories.¹

950. A proprietor of an entailed estate having purchased additional lands, executed an entail of these lands, in which reference was made for the conditions to the former entail, as recorded in the Register of Tailzies and Register of Sasines; Was such reference sufficient?

No; the conditions must be contained in the entail itself.²
[Such a reference is now competent; Consolidation Act, § 9.]

951. What were the requisites of a strict entail, in point of form and completion, executed before 1st August, 1848?

(1.) The requisites, in point of form, besides the ordinary executive clauses and solemnities, were, 1st, a prohibition against

¹ Renton, 5th Dec. 1837, 16 S. 184; aff. 18th Aug. 1843 (2 Bell's App. 214); Fogo, 25th Feb. 1840, 2 D. 651; aff. 18th Aug. 1843, 2 Bell's App. 195.

² Gammel, 13th Nov. 1849, 12 D. 19; Forbes, 14th May, 1858, 20 D. 917.

altering the order of succession ; 2nd, a prohibition against selling ; 3rd, a prohibition against contracting debt ; 4th, irritant and resolute clauses, duly framed and applied ; and, 5th, an express clause for registration in the Register of Entails.

(2.) The requisites of completion were, 1st, registration of the entail in the Register of Entails ; and, 2nd, infestment on the entail, the instrument of sasine containing *ad longum* the whole prohibitory, irritant, and resolute clauses. Where the entail was in the form of a procuratory of resignation, these clauses required to be inserted in the charter as well as in the sasine.

952. What modifications in the form of the entail were authorised by the Entail Amendment Act, 1848, and by the Titles to Land Act ?

(1.) By the Entail Amendment Act, the insertion in the deed of entail of irritant and resolute clauses is dispensed with, provided the deed contains an express clause authorising registration in the Register of Entails ; such clause being declared to have the same operation and effect as the most formal irritant and resolute clauses duly applied to the prohibitions and conditions.¹

(2.) By the Titles to Land Act, the insertion in the deed of clauses of prohibition against alienation, contracting debt, and altering the order of succession, is dispensed with, provided the deed contains an express clause authorising registration in the Register of Tailzies ; such clause having, in every respect, the same operation and effect as if the clauses of prohibition had been inserted, and duly fenced with irritant and resolute clauses.² [This second modification was by the Titles Act, 1860, extended to burgage subjects ; and both modifications are repeated in § 14 of the Consolidation Act, 1868.]

953. An old entail was duly completed in 1800, and titles were made up by heirs in 1830 and 1850. A new entail was duly completed in 1850, and titles were made up by heirs in 1855 and 1859 ; explain the rules as to the insertion of, or reference to, the fetters and relative clauses in the several heirs' titles respectively.

(1.) Under an entail completed in 1800—

¹ 11 & 12 Vict. c. 36, § 39.

² 21 & 22 Vict. c. 76, § 18.

1. In titles made up by an heir in 1830, the destination, and the whole prohibitory, irritant, and resolute clauses required to be inserted.

2. In titles made up by an heir in 1850, the destination had to be inserted, but it was unnecessary to insert the restraining clauses, it being sufficient to make reference in the titles to these clauses, as set forth at length in the deed of entail, as recorded in the Register of Entails, or as set forth in any recorded instrument of sasine forming part of the progress of titles of the lands.¹

(2.) Under a new entail completed in 1850—

1. In titles made up by an heir in 1855, the destination required to be inserted, but it was sufficient to make reference to the conditions, and to the clause authorising registration in the Register of Tailzies, as set forth in the deed of entail as recorded in the Register of Entails, or in any recorded instrument of sasine forming part of the progress.²

2. In titles made up by an heir in 1859, it was unnecessary to insert either the destination or the conditions, it being sufficient to refer to the destination as set forth in the deed of entail as recorded in the Register of Entails, or in any conveyance, writ, or instrument, recorded in the Register of Sasines and forming part of the progress;³ and to the conditions and clause authorising registration in the Register of Tailzies as set forth in the recorded deed of entail or any recorded instrument of sasine; but it appears to be doubtful whether it is competent to refer for the conditions and clause of registration to any writ, other than instruments of sasine, recorded in the Register of Sasines. [This doubt is now resolved by section 9 of the Consolidation Act, expressly making it competent to refer for the destination, or the conditions of entail, and prohibitory, irritant, and resolute clauses, or clause authorising registration in the Register of Tailzies, to the same as set forth at length in the Deed of Entail recorded in the Register of Tailzies, or in any conveyance or deed recorded in the Sasine Register and forming part of the progress. Schedule C is a form of clause of reference.]

¹ 10 & 11 Vict. c. 47, § 5; c. 48, § 4; c. 51, § 26.

² 11 & 12 Vict. c. 36, § 39.

³ 21 & 22 Vict. c. 76, § 17.(p)

(p) Extended to burgage lands; 24 & 25 Vict. c. 143, § 11, and Schedule L. See also § 27.

954. Where the entail has been recorded in the Register of Tailzies ; Is it necessary to insert the conditions in the first sasine ?

It is understood to be the practice, founded on a construction of the statutes that reference is incompetent until the conditions have been feudalised, and that it is necessary to insert them at full length in the first sasine, although the entail has been previously recorded in the Register of Tailzies. But it may be doubted whether the insertion of the conditions is indispensable, and whether they may not be as effectually feudalised by reference as by full insertion ; reference to the recorded deed of entail being declared lawful and competent in instruments of sasine, and "all other deeds and instruments of what nature soever, necessary to transmit, renew, or *complete* a title" under the entail ;^(w) and such reference being held equivalent to the full insertion of the conditions, and being declared to have "to all intents and in all questions whatever, whether *inter hæredes* or with third parties, the same legal effect as if the same had been inserted exactly as they may be expressed in the recorded deed or instrument referred to."¹ [Consolidation Act, § 9.]

955. A strict entail was executed in favour of B and a series of substitutes. B first feudalised and afterwards recorded it in the Register of Tailzies ; Was the estate attachable by his personal creditors ?

The estate was attachable by the creditors of B, whose debts,

¹ Acts as in note 1, previous page ; Duff's Entails, 124, 131.

(w) This view, though supported by the authority of Mr. Duff, rather seems to be erroneous. (1) The 10 & 11 Vict. c. 48, relates to "the *transference* of lands," while an entail, besides being a deed of transference, is also in one sense a deed of constitution. (2) The provision (§ 4) refers to lands "held under a deed of entail," which words are repeated in the Titles Acts 1858, § 17, and 1860, § 11, and seem to assume that the title has been already completed. (3) The deeds specified (and which in order all precede "instruments of sasine") are "dispositions and conveyances of such lands," &c., being proper deeds of transmission, while the deed of entail is not mentioned, though, had it been intended to be included, it probably would have been specified, and first in order. (4) The term "complete," coming as it does after the words "transmit and renew," is probably controlled by them, and to be read as applicable, not to the original, but to a subsequent title ; and (5) The *ipsissima verba* of § 4, are repeated in § 5 in reference to real burdens, where they are necessarily limited to cases of transference.

whether personal or real, were contracted before the date of recording the entail in the Register of Tailzies, subsequent registration being no bar to their diligence.¹

956. A executed a strict entail in favour of himself and the heirs of his body, whom failing, a series of substitutes ; and the entail was recorded in the Register of Tailzies, but was not feudalised. B, the eldest son of A, neglecting the entail, made up a fee-simple title, and was infeft ; Can the estate be adjudged for B's debts ?

Yes ; the rule being, that if the entail has not been feudalised, although recorded in the Register of Tailzies, it is not effectual against the creditors of the heir of investiture who has made up a fee-simple title.²

957. A executed a strict entail in favour of himself, whom failing, B and a series of substitutes ; and the entail was recorded in the Register of Tailzies, but was not feudalised ; Can the creditors of B, who possesses on apparency, attach the estate ?

(1) If B is heir of the last investiture, his creditors may charge him to enter heir to his predecessor, and then adjudge the estate.³(x) (2) But if B has no title independently of the entail, his creditors cannot attach the estate while the entail remains personal ; on the principle that the personal right is qualified by its conditions.⁴

¹ Smollet's Crs., 14th May, 1807, M. App. "Tailzies," No. 12 ; Rose, 11th June, 1828, 6 S. 945 ; aff. 30th Aug. 1831, 5 W. & S.

² Douglas, 21st Feb. 1765, 3 Ross L.C. 169.

³ Douglas v. Stewart, M. 15616 ; 3 Ross L.C. 174.

⁴ Baillie v. Denham, 5th June, 1733, 3 Ross L.C. 186.

(x) It is, under the Act 1685, c. 22, essential to the validity of an entail that it be feudalised, but it is not necessary that the original deed of entail be itself the basis of the feudal investiture, or itself enter the feudal progress ; E. of Fife, 2nd March, 1861, 23 D. 657 ; 20th March, 1862, 24 D. 936 ; aff. 27th March, 1863, 1 M.P. 19. Here the entail was recorded in the Register of Tailzies, but not feudalised. The heirs-portioners made up a title in fee-simple, and executed a deed in terms of the entail in favour of the eldest, who was the person entitled to succeed under it. Held effectual.

958. Is an entail made by an heir possessing on apparency binding on his heir, if the former had been three years in possession?

(1) If the entail is onerous and the heir has passed by the entail, he is bound, under the Act 1695, c. 24, to make up titles and grant a new and valid entail. (2) But if the entail is gratuitous, the heir is not so bound, as the statute does not apply to gratuitous deeds, its object being the protection of creditors.¹

959. Where an heir of entail, being heir of the last investiture under an entail recorded in the Register of Tailzies, has possessed on apparency for three years without completing a title under the entail; May the estate be attached for his debts after his death?

No; the next heir may complete a title under the entail, without incurring liability, under the Act 1695, c. 24; because the debts which under the statute are effectual against the next heir, are such only as could have been chargeable on the estate, if they had been contracted by himself.²

960. May the maker of an entail include himself within the prohibitions?

The maker cannot withdraw his estate from the diligence of his creditors by including himself within the prohibitions; unless the entail is onerous or mutual.³ And even where the entail is onerous, the estate is not protected from debts due by the maker at the date of the entail, nor from debts subsequently contracted, but made real by infestment or adjudication before the entail has been feudalised.⁴

961. What is the effect of an entail in which females are called, but heirs-portioners are not excluded?

(1) The devolution of the estate to heirs-portioners extinguishes the entail; the transmission of the estate in a divided form being

¹ M. of Clydesdale, M. 1274; Sandford's Entails, 96.

² Ersk. 3, 8, 24, Ivory's Notes; Bell's Prin. 1747.

³ Dickson, 24th Feb. 1801, M. App. "Tailzie," No. 7.(y)

⁴ Agnew, 31st July, 1822, 1 S. App. 320.

(y) See also Graham, M. 15439.

inconsistent with the nature and purpose of entails.¹ (2) But although the entail is liable to be defeated as soon as the succession should open to heirs-portioners, it is a good entail until that contingency happens, and is not in the meantime defeasible at the suit of the heir in possession.²(z)

962. Two sisters served themselves heirs of provision under the destination of an entail (which did not exclude heirs-portioners) to the heir of entail who had possessed the estate immediately before them; Were they liable for the preceding heir's debts? State the reason.

No; because although the entail may practically terminate when the succession opens to heirs-portioners, the fetters are not dissolved before they succeed, and consequently the preceding heir had no power to burden the fee with debts. Heirs-portioners are held to be in the position, not of heirs whomsoever, but of last substitutes.³

963. Are the fetters binding on the heirs whomsoever?

(1.) In the general case, a tailzied fee becomes simple when it terminates on heirs whomsoever of the granter or last substitute.⁴(a)

¹ Hunter, 11th Dec. 1834, 13 S. 185.

³ Farquhar, 3rd Feb. 1842, 4 D. 600.

² Mure, 16th Feb. 1837, 15 S. 581; Duff's Entails, 37.

⁴ Ersk. 3, 8, 32.

(z) The same rule was applied where the destination terminated on "my own nearest of kindred;" and it was held, on the *assumption* that this would or might call more than one person to the succession, that the immediately prior substitute, being the heir in possession, had not power to defeat the entail; Collo's Trs., 23rd Feb. 1866, 4 M'P. 465. See as to this case, *infra*, note (a).

(a) So where an heir of entail in possession was sequestrated under the Bankrupt Act at a time when, in the event of his death without issue (which happened), the succession would open to the heirs and assignees whatsoever of the entailer; held that the estate was liable for the debts and deeds of the bankrupt, and was vested in the trustee in the sequestration; Steele, 15th Feb. 1853, 15 D. 385, 2 Stu. 387. A deed of entail was made by the trustees of A in terms of his settlement in favour of B, his son, "and his heirs whatsoever, the eldest heir-female and the descendants of her body, excluding heirs-portioners,

(2.) But the heirs whomsoever of an intermediate substitute, where these are called, are proper heirs of tailzie; because the future substitutes have a *jus crediti* to enforce the fetters.¹

964. Explain the operation of the irritant and resolute clauses.

(1) An irritant clause irritates or annuls the act or deed prohibited, in so far as it may affect the estate. (2) A resolute clause forfeits or dissolves the right of the contravener.²

965. An entail contained perfect prohibitions against alienation and the contraction of debt, but the prohibition against altering the order of succession was defective; Might the estate be adjudged for the debts of the heir in possession?

¹ Stirling, 28th May, 1845, 7 D. 640; Duff's Entails, 39. ² Ersk. 3, 8, 25.

and succeeding always without division through the whole course of the female succession, whom failing, then to the heirs whatsoever of the said deceased A." Held that this destination was not capable of being the subject of an effectual entail; Macgregor, 1st Dec. 1864, 3 M.P. 148. See also Gordon, 1st March, 1862, 24 D. 687, where it was held by Lord Neaves, in reference to the same deed, that the circumstance of the institute being illegitimate, and his heirs whatsoever being therefore necessarily the heirs of his body, did not make the destination good as a tailzied succession; but on the case going to the Inner House, the Court *ex proprio motu* dismissed the action, in respect that there was no proper defender called with whom the question could be tried.

Where the final destination was "to my own nearest of kindred, and their heirs and disponees whomsoever," held that "my own nearest of kindred" limited the succession to persons of the blood of the entailer, and therefore (distinguishing from a destination "to my own heirs and assignees") that it constituted a good tailzied destination, effectual against prior substitutes; Collow's Tra. *ut supra*.

An entail was executed in favour of several *nominatim* substitutes and their heirs-male, whom failing, the maker's "own nearest heirs whatsoever and their assignees, the eldest heir-female and the descendants of her body, excluding heirs-portioners, and succeeding always without division through the whole course of female succession, whether of heirs of tailzie or of heirs whatsoever who might succeed in terms of the last destination before specified." Held that, notwithstanding the exclusion of heirs-portioners, the sole surviving *nominatim* substitute was entitled to acquire in fee-simple; Gordon, 19th Dec. 1851, 14 D. 269.

Yes; an entail defective in any one of the prohibitions being now invalid and ineffectual as regards them all.¹

966. In 1800 a party granted an obligation to make a tailzie, dispensing with delivery. He retained possession of the obligation till his death, in 1820. An action is raised in 1859 to enforce implement, against which negative prescription is pleaded; Is the defence good? State the reason.

No; because prescription runs, not from the date of the obligation, but from the time at which it takes effect. The party in right of the obligation was *non valens agere* till the granter's death; and, therefore, when the action was raised, the full prescriptive period of forty years had not expired.

967. Where directions are given to trustees to execute a strict entail of lands, specifying the usual prohibitions, except the prohibition to contract debt, but instructing them to insert all other conditions and clauses which they should consider necessary for carrying the truster's intention into effect; Is the institute entitled to insist on an entail without a clause prohibiting the contracting of debt?

No; because the trustees are directed to execute a *strict* entail; and without a prohibition to contract debt, an entail would not be effectual.² But if the trust-deed specifies the conditions without directing the execution of a strict entail, and without giving discretionary powers, the trustees are not entitled to insert more than the specified conditions.³(b) [Ochterlony, 4 R. 587.]

¹ 11 & 12 Vict. c. 36, § 43.

³ Cuming's Tra., 10th July, 1832,

² Stirling, 30th Nov. 1838, 1 D. 130. 10 S. 804.

(b) This is always a question of intention, and the use of the word "entail" is not essential. "There are many cases in which it has been found that a direction to entail is to be discovered and dealt with according to what appears in a trust-deed to be the intention of the truster, although he may not have introduced into the trust-deed any statement of the clauses that are to be contained in the entail; nor does it appear inconsistent with these decisions that this should be so, although the word 'entail' may not occur in

968. An entail was made in favour of A in liferent, for her liferent use only, and to the second son to be procreated of her body, and the heirs-male of his body, whom failing, &c., and the prohibitions were directed against A and the heirs of entail generally. The second son, who was not born till two years after the entailer's death, served himself heir of tailzie under the entail, and completed the entail by infestment; Was he bound by the fetters?

The second son was not bound by the fetters; because the fee vested in him on his coming into existence as institute, and therefore he is not comprehended within the term *heirs*; his character

the trust-deed: " *per* Lord President M'Neill in *Thurburn's Tra.*, decided 24th, reported 30th Nov. 1864, 3 M.P. 134, where, and in *Leny*, 28th June, 1860, 22 D. 1272, and *Cameron's Tra.*, 14th Dec. 1860, 23 D. 167, it was held that the directions did not warrant the execution of an entail.

Where an entailed proprietor directed his trustees to purchase and entail lands on the same series of heirs and in terms of the entail of his estate, and it was discovered after his death that that entail, from being partially invalid, was, by the operation of the 11 & 12 Vict. c. 36, § 43, rendered absolutely null, it was held that the next heir of entail was not entitled to get the lands so purchased in fee-simple, but that the trustees must execute an effectual entail; *Graham*, 15th March, 1852, 15 D. 558; *aff.* 18 D. 37.

A testator directed his trustees to purchase lands with the residue of his estate, and to execute an entail thereof in favour of A and his heirs whatsoever, whom failing, to B and his heirs whatsoever, excluding heirs-portioners, whom failing, to the heirs and assignees of the testator. A and B were natural sons of the testator. B predeceased his father, without issue. Held that a deed in these terms would not be an effectual entail, but would vest the lands in A in fee-simple; that the trustees were not entitled with the view of making effectual the testator's intention, to execute an entail in favour of A and the heirs of his body; and that, as the testator's intention could not be carried out, A was entitled to demand the residue in money; *Gordon*, 2nd March, 1866, 4 M.P. 501.

It was held under a will that two sums were to be invested in landed estates, to be entailed, the one on A and her heirs-male, whom failing, on B and her heirs-male, and the other on B and her heirs-male, whom failing, on A and her heirs-male, but with no further destination. A having died before any purchase was made, without heirs-male, but leaving a daughter, held that both sums should be invested in lands to be entailed on B and her heirs-male; and she having subsequently died without heirs-male, but leaving two daughters, held that her marriage-contract trustees, to whom she had conveyed her whole rights under the will, were entitled to have the whole lands transferred to them in fee-simple; *Macalister*, 9th March, 1842, 4 D. 890.

as institute not being affected by his completing a title by service.¹(d) [Glendonwyn, 11 M'P. (H. of L.) 33.]

969. An entail was made in favour of A, whom failing, to B, whom failing, &c., and the prohibitions were directed against the "heirs and substitutes of entail." A predeceased the entailer; and, on his death, B made up titles under the entail; Was he bound by the fetters?

Yes; because he was a substitute, and as the status of institute is personal to him who is first called as disponent, B did not acquire that character by his having survived A, and being the first to make up titles under the entail.²

970. An heir of entail having incurred forfeiture of the estate to the Crown by treason, the estate was claimed after his death by the next heir, on the ground that the preceding heir's right had been forfeited by acts of contravention committed previous to the treason; Was the claim valid? State the reason.

The claim was not valid; because the right of a contravener subsists until the act of contravention is declared, and his title dissolved by decree of declarator and forfeiture; and that not having been done, the forfeiture by treason cannot be excluded on the ground of irritancies previously committed.³(e)

¹ Maxwell, 20th Dec. 1836, 15 S. 291; aff. 1st Aug. 1839, M'L. & R. 790.

² Mackenzie, 24th Nov. 1818, F.C.; aff. (13th May, 1822) 1 Sh. App. 150.

³ Gordon, M. 4728.

(d) Prohibitions directed against "the heirs and members of entail" do not affect the institute; Steele, 12th May, 1814, F.C.; but *contra* where the irritant and resolute clauses were directed against each and "every heir and person," and the institute was mentioned by name in the prohibitory clause; Douglas & Co., 14th Nov. 1823, 2 S. 487.

The usual prohibitions and clauses irritant and resolute are now unnecessary where there is an express clause authorising registration in the Register of Tailzies. See *supra*, Ans. 952.

(e) The circumstances of the case here referred to (Gordon) are not accurately stated in the question. The next heir's claim was made—(when alone it could be; Maxwell, 15th Dec. 1843, 6 D. 255)—*during the contravener's life*, and, as here stated, the Court of Session refused to give effect to the contravention, as not having been declared previously to the forfeiture. Another

971. May deeds granted in contravention of the entail be set aside without reduction of the contravener's title; or may the contravener's title be reduced without declarator of irritancy annulling the deed granted in contravention?

Deeds granted in contravention of the entail may be set aside at the instance of the substitutes, without reduction of the contravener's title;¹ but reduction of the title of the contravener must be preceded, or at least accompanied, by decree of declarator of irritancy annulling the deed granted in contravention.²

972. An estate was entailed on A, B, C, and D, in their order, and the heirs of their bodies respectively, and it was declared that, on committing an act of contravention, the contravener should forfeit, not for himself only, but also for his descendants. B having granted a deed in contravention of the entail, Has the heir of his body or D a title to reduce it?

(1) The heir of B's body has no title to challenge the deed, it having been held that, where the forfeiting clauses were not

¹ Duff's Entails, 118.

² Bontine, 15th Jan. 1823, 2 S. 106; Duff's Entails, 118.

question arose as to the extent of the forfeiture, and the Court found that it affected only the life-interest of the contravener, and that on his death the next heir would be entitled to succeed. The House of Lords reversed this part of the judgment, while affirming the other, and found that the forfeiture would subsist "so long as there shall be any issue male of his body which would be inheritable to the estate tailzie in case he had not been attainted," but that thereafter the next heir would be entitled to succeed, and reserved to him to apply to the Court on any new right accruing. On the death of the contravener, leaving two sons, born abroad, after his attainder, the next heir applied again, pleading that the sons were aliens, incapable of succeeding, and that therefore the succession had opened to him. The Court of Session rejected the claim, but the House of Lords, on appeal, sustained it. The question therefore should bear that "the estate was claimed during his life," and the answer as to the effect of the forfeiture should be qualified as above.

Where an entail provides that an heir's right shall come to an end on any contingency not of the nature of a contravention, such as his succession to a peerage, the devolution takes place without any declarator, and the next heir is entitled to the rents from the date of the succession to the peerage; Hawarden, 2nd Feb. 1866, 4 M.P. 353.

limited in their application to the contravener only, but were directed against his descendants, a descendant is barred from objecting to an act of contravention.¹(f) (2) D, although not the immediate substitute to the contravener, is entitled to reduce; the right of reduction being competent to any substitute, however remote.²

973. May an alienation of part of the estate in contravention of the entail be set aside after the lapse of forty years? State the reason.

No; the reason being, that as the heir in possession is feudal proprietor, alienations by him are not *ipso jure* null, but challengeable only in virtue of the statute; and, therefore, if not challenged within forty years, they are forfeited by prescription.³

974. May a deed, granted in contravention of the conditions of the entail, be reduced, and declarator of forfeiture of the right of the contravener's descendants be pursued, after the contravener's death?

A deed granted in contravention of the conditions may be reduced, but declarator of forfeiture cannot be pursued, after the contravener's death, even where the forfeiture is directed by the deed of entail against the heirs of tailzie and their descendants.⁴

975. What is the effect of contravention on the contravener's descendants?

In the general case, the effects of contravention are limited to the contravener only. But where they are extended to the descendants expressly by the entail, the irritancy will strike against the descendants of the contravener as well as himself.⁵(i)

¹ Cra. of Gordon, M. 15384; Gil-mour, 6th March, 1801, M. App. "Tailzie," No. 9.

² Dundas, M. 15430.

³ Agnew, 23rd June, 1813, F.C.; Menzies Lect. 726 (765).(g)

⁴ Mordaunt, 9th March, 1819, F.C., and 5th July, 1822, 1 S. (Ap.), 169; Maxwell, 15th Dec. 1843, 6 D. 255.

⁵ Ersk. 3, 8, 31, Ivory's Notes. See Gordon, M. 15384; Bontine, 2nd March, 1837, 15 S. 711.(h)

(f) The title of a contravener's son suing jointly with a remoter heir has in such a case been sustained; Keith Turner, M. "Tailzie," App. 16.

(g) See also Mackay (Bargany), M. 11171.

(h) Aff. 1 Rob. App. 347.

(i) See Turner, *supra*, note (f).

976. Do liferent securities granted by the heir in possession fall by his subsequent forfeiture?

No ; it being provided by the Entail Amendment Act that no irritancies committed by the heir in possession shall in any way affect, in the person of any purchasers or *bona fide* onerous creditors, any conveyances or securities granted in reference to the estate, or the rents, prior to the execution of the summons of declarator, which are not invalid as being inconsistent with the provisions of the entail.¹

977. To what extent is an heir of entail liable for the entailer's debts?

(1) An heir of entail in possession, who is not the general representative of the entailer, is liable for the entailer's debts only to the amount of the value of the estate.² He is not bound to relieve the estate of the debts by discharging them out of his separate funds; but on paying those debts he may take assignation, and keep them up against the succeeding heirs and the estate.³
 (2) An heir of entail is personally liable for the interest during his possession, but it, as well as the principal, affects the fee of the lands.⁴(*k*) [The enactment quoted in note (*k*) is substantially repeated by the Entail Amendment Act, 1868, § 11.]

¹ 11 & 12 Vict. c. 36, § 40.

³ Ker, M. 15551 ; Lawrie, 7th Dec.

² Bell's Prin. 1748 ; Duff's Entails, 121 ; Sutherland, 26th Feb. 1801, M. App. "Tailzie," No. 8.

1830, 9 S. 147.

⁴ Campbell, 29th Nov. 1815, F.C.

(*k*) By the Titles to Land Act, 1860, § 29, it is provided that "In all cases where there are or shall be entailer's or other debts or other sums of money which might lawfully be made chargeable by adjudication or otherwise upon the fee of the entailed estate, the heir of entail in possession of such estate for the time being shall have all the like powers of charging the fee and rents of such estate, or any portion thereof, other than the mansion-house, offices, and policies thereof, with such debts or sums of money, and of granting, with the authority of the Court of Session, bonds and dispositions in security for the amount of such debts and sums of money as, by the Act 11 & 12 Vict. c. 36, and the Act 16 & 17 Vict. c. 94, are conferred with reference to provisions for younger children." See *infra*, Ans. 982 *et seq.*

The maker of an entail executed a trust-deed, by which he directed his trustees to pay certain provisions to his younger children, and declared that in case the estate thereby conveyed should be insufficient to pay the whole provisions, then "I bind and oblige my heirs of entail succeeding to my en-

978. Is the heir in possession liable for the debts of preceding heirs of entail?

(1) The heir in possession is liable for such debts if he is the debtor's general representative; (2) otherwise he is not liable, unless the debts have been constituted under the provisions of the Tailzie or the Entail Acts.

979. What is the proper form of attaching the heir's life-interest in the estate?

Adjudication of the lands themselves (not merely the heir's life-interest), under the qualification that the adjudication shall be absolutely extinguished, and the lands redeemed by the death of the debtor.¹

980. What is the legal character of the right which an heir of entail grants to his wife under the Aberdeen Act, and how is the right completed?

By the Aberdeen Act an heir of entail, under an entail which does not sanction adequate provisions, is entitled to provide and infest his wife in a liferent provision out of the entailed lands by way of annuity, not exceeding one-third part of the free yearly rent or value as at the death of the granter, after deducting annual burdens, liferents, interest of debts, &c.²(1) Where *two*

¹ Graham, 14th Nov. 1828, 7 S. 13; Duff's Entails, 57. ² 5 Geo. IV. c. 87, § 1.

tailed estates to pay the deficiency, the heir of entail being entitled to relieve him or herself by an application to the Court of Session, in terms of the Act 6 & 7 Will. IV. c. 42." Held that the provisions (but not the expense of making the application to the Court) might be charged under the Titles to Land Act; Blair, 11th March, 1865, 3 M'P. 698.

The maker of an entail bound himself, his "heirs-at-law, executors, and successors," to free and relieve the entailed estate of all his debts and obligations. Sixteen years previous to the execution of the entail he had granted a *mortis causa* bond for £6000 in favour of his wife in liferent and his only son in fee, which was gratuitous, and declared to be revocable. His personal estate was insufficient to pay his debts. After the death of the widow, his son, as heir of entail, presented a petition for authority to charge the entailed estate with the sum in the bond. Held that, assuming it to be an entailer's debt, it was not extinguished *confusione*, but that it was a debt which he had expressed his desire should not be made a burden on the estate. Petition refused; Macalister, 16th Dec. 1865, 4 M'P. 245.

(1) See *formulae* for calculating provisions to wives and children in Lockhart M'Donald, 18th May, 1836, 14 S. 785.

By the 11 & 12 Vict. c. 36, § 12, it was provided that the 5 Geo. IV. c. 87,

liferents, under the statute, are existing at the same time, a third cannot be granted so as to take effect before one of the subsisting liferents expire, but such liferent may be granted to take effect prospectively.¹ The security does not affect the fee but only the rents.²(*m*) [By the 8th section of the Entail Amendment Act, 1868, the Aberdeen Act is declared to be applicable to all entails unless expressly excluded by the deed of entail.]

The provision is constituted by an obligation in a contract of marriage or by a separate bond of annuity, by which the granter, narrating the enactment, provides and disposes to his wife in liferent during all the days of her life after his death, in case she should survive him, a free yearly annuity, to be uplifted furth of the lands; with the declaration that the annuity is provided under all the conditions, restrictions, and limitations contained in the statute, and with an obligation to infest in liferent *de me*, and precept. [The obligation to infest and precept are not now inserted; Jur. Styles, i. 189, 233.] As it is doubtful whether annuities, upliftable out of entailed estates, in virtue of the Aberdeen Act, are in the class of "securities over lands, or the rents or profits thereof," and, consequently, whether the provisions of the Heritable Securities Acts are applicable to bonds of this description, (*n*) the right should be

¹ 5 Geo. IV. c. 87, § 3.

² *Ibid.* § 8.

should not be applicable to any tailzie dated on or after 1st August, 1848, but by the 16 & 17 Vict. c. 94, § 12, it is provided that "where in any tailzie executed after the 1st day of August, 1848, the maker of such tailzie has declared, or shall declare," that the 5 Geo. IV. c. 87, "shall be applicable to such tailzie, then and in that case such Act shall be applicable to such tailzie," as if it had been executed prior to 1st August, 1848.

By the 5 Geo. IV. c. 87, § 13, it is provided "that the powers given and granted by this Act, and by the said recited Act" (10 Geo. III. c. 51), "shall in no case be exercised to such an extent as to deprive the heir in possession" "of more than two-third parts of the free yearly rents, or free yearly proceeds," of the estate.

(*m*) An annuity to a widow does not affect the rents of the estate accruing after her death, and therefore arrears are not recoverable from an heir of entail who had succeeded after her death, and did not represent the heir during whose possession the arrears had accumulated; Kiernan, 9th Feb. 1866, 4 M'P. 431.

(*n*) The doubt here expressed is referred to also in Jur. Styles, i. 664, but it hardly seems to be well founded. By the 5 Geo. IV. c. 87, § 1, an heir of entail is empowered "to provide and infest his wife in a liferent provision out of his entailed lands and estates by way of annuity," which it is declared, by

completed by infestment or by registration (with a warrant) under the Titles Act. [All deeds now require warrants before registration in the Sasine Registers. An heir of entail survived his succession only fourteen days. He did not complete a title, but granted an Aberdeen annuity. Held that the annuity was competently granted, in virtue of the personal right to lands conferred by § 9 of the Conveyancing Act. See M'Adam, 6 R. 1257.]

981. Whether is a liferent provision to a widow, by way of annuity, not exceeding a certain proportion of the rents granted under the Aberdeen Act, or in virtue of a power in the entail, estimated according to the rental of the year of the granter's death or according to the rental as at the date of the deed?

(1) A liferent provision to a widow by way of annuity, granted under the Aberdeen Act, is estimated according to the rental of the year of the granter's death.¹(o) (2) But such a provision, granted in virtue of powers in the entail, is estimated according to the rental of the lands at the date of the deed by which it is conferred.²(p)

982. Do provisions to children, under a power in the entail or under the Aberdeen Act, affect the fee, or only the rents of the estate?

¹ 5 Geo. IV. c. 87, § 1.

² Malcolm, 21st Nov. 1823, 2 S. 514.(p)

§ 8, shall "affect the *yearly rents or proceeds* of the said lands and estates," while by the 17 & 18 Vict. c. 72, § 1, it is provided that the Acts 8 & 9 Vict. c. 31, and 10 & 11 Vict. c. 50, shall apply "to all deeds which, according to the existing law and practice, require to be followed by infestment, in order to constitute a security over lands, or *the rents or profits* thereof," terms which seem sufficiently comprehensive to include the bonds in question; but if they are not "securities over lands, or the rents or profits thereof," infestment seems inappropriate to them.

(o) This was held to mean the year *current* at the death, and where a party died on 22nd Jan. 1828, the rent of 1828 was taken as the rule; Campbell, 21st May, 1831, 9 S. 624.

(p) The case (Malcolm) here quoted turned on the construction of the clause in the entail, and not on any general principle; and in E. of Rothes, 29th Jan. 1829, 7 S. 339, the rental for the year of the death, and not that at the date of the bond, was taken as the rule. This case related to provisions to children, but the principle is the same.

In ascertaining the amount of provisions that may be granted to wives and children, the rent of game in use to be let is included; Sinclair, 24th Nov. 1842, 5 D. 174; Macpherson, 16th Feb. 1843, 5 D. 651.

(1) Provisions granted under an unqualified power in the entail resemble an entailer's debt, and the fee of the estate is liable to be attached for payment.¹ (2) Provisions under the Aberdeen Act do not affect the fee, but only the rents ;² but such provisions may, under the Entail Amendment Act, be charged upon the fee of the estate (except the mansion-house and policies) by bond and disposition in security.³(*q*)

983. Explain the nature and effect of provisions granted by an heir of entail to his children under the Aberdeen Act.

(1.) By the Aberdeen Act it is competent for the heir of entail in possession, under entails containing defective powers, to grant bonds of provision, or obligations binding the succeeding heirs of entail to pay to his children who shall not succeed to the estate a sum not exceeding one year's free rent (after deducting annual payments) for one child, two years' free rent for two children, and three years' free rent for three or more children, with interest from the granter's death, and payable one year after the granter's death.⁴

(2.) Where provisions to children are already constituted to the full extent, no further provisions can be granted till some part of the former provisions shall have been extinguished ; the heir in possession being entitled to grant provisions only in so far as the power may be open or unexercised for the time.⁵(*r*)

(3.) The provisions are effectual only to such children as are alive at or born after the death of the granter.⁶(*s*) [See, however,

¹ *Duchess of Richmond*, 2nd Dec. 1887, 16 S. 172.

² 5 Geo. IV. c. 87, § 8.

³ 11 & 12 Vict. c. 36, § 21.

⁴ 5 Geo. IV. c. 87, § 4.

⁵ *Ibid.* § 6.

⁶ *Ibid.* § 4.

(*q*) The 21st section of the Act applies also to provisions granted in virtue of powers in the entail, but "no heir of entail in possession of an entailed estate shall charge the same, under this Act, with any provision to any younger child or children until he shall have applied for and obtained the authority of the Court thereto ;" § 23. By the 16 & 17 Vict. c. 94, such bond may be granted either to the children or any other party in right of the provision, or to any party advancing the amount thereof (§ 7), and may "contain a power of sale in ordinary form ;" § 23.

(*r*) See note (*l*), *Ans.* 980.

(*s*) The provision of any child succeeding to the entailed estate is thereupon, so far as not previously paid, extinguished ; 5 Geo. IV. c. 87, § 6.

the enactments in favour of issue of predeceasing children, § 10 of the Entail Amendment (Scotland) Act, 1875, and § 3 of the Entail Amendment (Scotland) Act, 1878.]

(4.) But any of the children may settle their provisions with consent of the granter thereof on the issue of their marriage, so as to be effectual to them in the event of the husband or wife, as the case may be, predeceasing the granter.¹

984. What is the effect of provisions granted by the heir in possession under the Aberdeen Act to his wife and children, while similar provisions by a former heir to the full extent of the statutory powers were still in subsistence?

(1) The wife's provision is valid, but its effect is suspended until the subsisting provision of the former heir's wife shall expire.² (2) The provisions of the children are null, as such provisions can be granted only in so far as the power is "open or unexercised for the time."³

985. Where bond and disposition in security has been granted under the Entail Amendment Act for children's provisions, and the interest has been allowed to fall into arrears; To what extent are the fee and rents chargeable with the arrears of interest, and what recourse has the holder of the bond for such arrears?

The fee and rents are chargeable only with the principal sum and two years' interest; but the holder of the bond has recourse for any further arrears of interest against the heir in possession, bound to pay and keep down the same, and against his representatives and separate estate.⁴(t)

¹ 5 Geo. IV. c. 87, § 6.

³ 5 Geo. IV. c. 87, § 6.

² *Ibid.* § 3.

⁴ 11 & 12 Vict. c. 36, § 22.

(t) "Including the rents of the said entailed estate during his or their possession;" Act, § 22. There is under 5 Geo. IV. c. 87, a limitation of the liability of an heir in possession for provisions to wives and children (see *supra*, note (l) Ans. 980); but as the granting of bonds and dispositions in security under 11 & 12 Vict. c. 36, is not compulsory, probably an heir granting such would forfeit the benefit of the provision of the 5 Geo. IV. c. 87.

986. Where an heir of entail has bound himself in his daughter's marriage-contract to pay her a provision; Is he bound to pay off a previous provision, the subsistence of which would have rendered inoperative the daughter's provision, as against the succeeding heirs of entail?

Yes; an heir of entail who grants a vested provision to his child being under an implied obligation to make it effectual.¹

987. The destination of an entail was to "A, and the heirs of his body, whom failing, to B, whom failing, to C, and the heirs of his body, whom failing," &c., and the deed contained power to grant provisions to "younger children other than the heir;" Was B, when the estate devolved upon him, entitled to burden the estate with a provision to his children? State the reason.

No; because the heirs of his body are not called in the destination, and there can be no "younger children" where none of the children of the heir in possession are entitled to succeed.²

988. In what cases does the Entail Amendment Act, 1848, authorise the heir in possession to sell?

(1.) He may, under the authority of the Court, sell any portion of the estate except the mansion-house and policies; 1st, for paying off any debts with which he might charge the lands by bond and disposition in security; or 2nd, debts with which he might charge the estate by Act of Parliament, but for which he has no power of sale; or 3rd, for any debts validly charged against the fee of the estate.³ To these are added, by 16 & 17 Vict. c. 94, entailer's debts, or other debts or sums of money which *might be made* chargeable upon the fee.(x)

¹ Sinclair, 22nd Jan. 1840, 2 D. 432; aff. 13th June, 1854, 1 Macq. App. 729.

² Dickson, (u) 4th Feb. 1852, 14 D. ³ 11 & 12 Vict. c. 36, § 25.

(u) The first branch of this case is reported 4th July, 1851, 13 D. 1291.

(x) This is under § 9 of the Act, and by § 10 it is provided that where at the passing of the Act a special Act had been obtained for the sale of an entailed estate, such sale may be carried through under the Entail Amendment Act, instead of the special one.

(2.) The heir in possession, of full age, may, under the authority of the Court, sell the estate in whole or in part, with the like consents as would enable him to disentail.¹ [Section 9 of the Entail Amendment Act, 1868, makes certain provisions as to sale, under the authority of the Court, by private bargain.]

989. How is the surplus of the price to be applied after a sale under the Rutherfurd Act?

(1) If the surplus exceeds £200, it is invested in other lands to be added to the entailed estate, or applied in payment of the entailer's debts, or of any money charged on the fee of the estate, or in redemption of land-tax, improvements, or repayment of improvements.^(y) (2) If the surplus is less than £200, it is paid to the heir in possession for his own use.²

[990. What are the powers of feuing given by the various Entail Statutes?

(1.) By the Rutherfurd Act, § 24, the heir in possession under an entail, dated before August, 1848, may at the sight of the Court grant feus to an extent not exceeding in all one-eighth part in value for the time of the estate. No grassum is permitted, nor can the mansion-house, &c., be feued.

(2.) By § 4 of the same Act, with the consents necessary for disentail, he can feu the estate in whole or in part.

(3.) By § 6 of the Act of 1853, it is competent to present what is called a continuing petition under which the rates of feu-duty and form of feu-right may be varied at the sight of the Court.

(4.) By § 13 of the last mentioned Act, § 24 of the Rutherfurd

¹ 11 & 12 Vict. c. 36, § 4.

² *Ibid.* § 25.

(y) By the 11 & 12 Vict. c. 36, § 26, "the heir in possession" is in certain circumstances entitled to apply to the Court to receive money arising from the sale of any portion of the estate "in repayment of money" expended in improvements. An heir who had executed improvements ceded possession to a nearer heir subsequently born. The nearer heir, as being in possession, presented a petition to the Court, with consent of the former heir, to have such money applied in repayment of his improvement expenditure. Held that the heir in possession who makes the application must be the heir who executed the improvements; that the circumstance that the heir who executed them having ceased to be the heir in possession, not by death, but by the birth of a nearer heir, formed no ground for making an exception to the rule; and petition dismissed; Stewart, 9th June, 1863, 1 M'P. 897.

Act is made applicable to entails dated after 1st August, 1848, unless feus are expressly prohibited by the entail.

(5.) By the Entail Amendment Act, 1868, §§ 3 and 4, feus may be granted, after certain procedure before the Sheriff, of any part of the estate (reserving the minerals, and except the mansion-house, &c.).

(6.) It is provided, § 5, that feu rights under the last mentioned enactment shall contain a clause voiding the right, if buildings of the annual value of at least double the feu-duty are not built on the ground within five years from its date, and kept in repair, and if such buildings cease to exist or be not kept in repair. In a case as to similar provisions in the Montgomery Act relating to long leaseholds, it was held that the statutory nullities are absolute. *Miller*, 5 M'P. 715.]

991. What is the endurance of leases that may be granted under the Montgomery, the Rosebery, and the Rutherford Acts?

(1.) The Montgomery Act authorises, 1st, improving leases for fourteen years after the ensuing term of Whitsunday, and for one life in addition ;(z) or for the lives of two persons in being at the date of the lease, and the life of the survivor, or for thirty-one years, the tenant being bound to inclose the lands within the time specified by the Act, and in the case of leases for two lives or more than nineteen years, the tenant being obliged to keep and leave the fences in repair ;(a) and 2nd, building leases for ninety-nine years, of not more than five acres to one person, but under the condition that one dwelling-house at least, not under the value of ten pounds, shall be erected within ten years for each half acre.(b) The manor-place and inclosures may not be leased, and all leases are declared null which are granted for a rent under the last rent, or for a grassum.¹

(2.) The Rosebery Act authorises leases for twenty-one years

¹ 10 Geo. III. c. 51, §§ 1-8.

(z) Such life being of a person existing at the time, and named.

(a) This passage should be, "the tenant, in the case of leases for two lives or more than nineteen years, being obliged, within the periods and in the manner specified in the Act, to inclose the lands, and thereafter to keep and preserve the fences in good and sufficient repair during the lease, and to leave them so at the expiration thereof."

(b) And shall be kept in proper repair.

of lands, and thirty-one years of minerals, either by public roup or private bargain, but without any grassum. The home-farm, or the mansion-house and enclosures, cannot be let for any period beyond the life of the heir in possession.¹

(3.) The Rutherfurd Act authorises, 1st, the heir in possession, of full age, with the like consents as are required for disentail, to lease the estate, in whole or in part, under the authority of the Court; and 2nd, the heir in possession under the old entails, after notice to the next heir and with the approbation of the Court, to grant long leases of one-eighth part of the estate in value, exclusive of the mansion-house, &c., for the highest rent that can be got, but without any grassum.²

992. To what extent are excambions permitted by the Montgomery, Rosebery, and Rutherfurd Acts?

(1.) The Montgomery Act authorises excambions to the extent of thirty acres of arable land, or one hundred acres unfit for tillage, for an equivalent in land contiguous to the entailed estate [§ 14 of the Entail Amendment Act, 1868, varies the foregoing provision of the Montgomery Act, and in place thereof enacts, that not more than three hundred acres of land lying together in one place shall be given in exchange, and that an equivalent in land shall be received]; the value of the land being ascertained by the Sheriff, and the contract being recorded in the Sheriff-court books, within three months after its execution.³

(2.) The Rosebery Act empowers heirs of entail to effect excambions of any portion of the estate not exceeding one-fourth of its value, excepting the mansion-house, garden, and home-farm.⁴ The forms of procedure introduced by the Rosebery Act are superseded by those authorised by the Rutherfurd Act, which provides that notice shall be given to those heirs whose consent would be required to a disentail.⁵

(3.) The Rutherfurd Act authorises the heir in possession to excamb the estate, in whole or in part, with certain consents, and under the authority of the Court.⁶(c)

¹ 6 & 7 Will. IV. c. 42, §§ 1, 2, 20.

² 11 & 12 Vict. c. 36, §§ 4, 24.

³ 10 Geo. III. c. 51, §§ 32, 33, 34.

⁴ 6 & 7 Will. IV. c. 42, §§ 3, 4.

⁵ 11 & 12 Vict. c. 36, §§ 36, 37.

⁶ *Ibid.* § 5.

(c) By the 3 & 4 Vict. c. 48, § 1, power was given to heirs of entail, or, if

993. What is the nature of the improvements contemplated by the Montgomery Act; and to what extent can the expense of such improvements be made a burden on the succeeding heirs?

(1.) The improvements contemplated by the Act are, 1st, inclosing, planting, draining, and erecting farm-houses and offices, but repairs are disallowed; and 2nd, building, repairing, or adding to the mansion-house and offices.¹ To these have been added, by the Entail Amendment Act, private roads through the estate or for immediate access to it, which are to be deemed improvements in the same way as inclosing, planting, and draining.²

(2.) The Montgomery Act enables the heir in possession to be a creditor of the succeeding heirs for three-fourths of his expenditure; but the claim is limited in the case of expenditure for inclosing, planting, draining, &c., to four years' free rent;³ and in the case of expenditure for building or repairing the mansion-house, to two years' free rent,⁴ after deduction of public burdens, liferents, and interest of debts, which shall affect the estate, as at the first term of Whitsunday after the death of the improver.

[It will be kept in view that the Rutherfurd Act and also the Entail Amendment Acts, 1868 and 1875, contain provisions as to improvement expenditure.]

994. How is the claim for improvement-expenditure made available against succeeding heirs under the Montgomery Act?

(1) Three months' notice before the commencement of the improvements must be given to the heir of entail(*d*) entitled to

¹ 10 Geo. III. c. 51, §§ 9, 27.

² 11 & 12 Vict. c. 36, § 20.

³ 10 Geo. III. c. 51, § 10.

⁴ *Ibid.* § 28.

in minority or under legal disability, to their tutors or other legal guardians, "to grant or dispoise in feu, or to let or lease for any period of endurance," certain limited portions of their estates, "as the sites of places of public Christian worship and schools, and for burying-grounds and play-grounds for such places of public worship and schools, respectively, and also for dwelling-houses and gardens for the ministers and schoolmasters thereof respectively."

(*d*) If within Great Britain or Ireland, or if abroad, to the nearest male relation by his father of lawful age, or to his known factor or attorney.

succeed after the heirs of the body of the improver, and a copy of the notice lodged with the sheriff-clerk; and the accounts^(e) and vouchers must be lodged annually, four months after Martinmas, with the sheriff-clerk for registration.¹ (2) The improver may get the amount judicially ascertained by action of declarator at his instance against the heir of entail entitled to succeed after the heirs of his own body.² (3) The claim is exigible one year after the death of the heir making the expenditure, with interest from the term at which the succeeding heir's right to the rents commenced, and, if not paid within three months after requisition, the executor or other person in right of the claim may institute an action against the succeeding heir, and, upon obtaining decree, use every kind of diligence except adjudication of the fee of the estate; but the heir is entitled to be discharged on assigning one-third of the clear rents of the estate, and any balance that may remain after his death becomes a debt against the succeeding heirs.³ (4) The creditor is bound to require payment from the succeeding heir within two years after the death of the improver; and, within six months, thereafter, institute an action against the heir, and, without delay, to take decree and do exact diligence against him for at least one-third part of the rents which shall have become due to him, under the penalty of losing recourse against the future heirs to the extent of such third part of the rents.⁴

995. Where an heir of entail has obtained decree of declarator for improvement-money under the Montgomery Act; For what amount, and for what period, may he be authorised to grant bond of annualrent under the Rutherford Act?

(1.) Where the improvements have been executed before the passing of the Act, the heir may be authorised to grant bond of

¹ 10 Geo. III. c. 51, §§ 12, 14.

² *Ibid.* § 26.

³ 10 Geo. III. c. 51, §§ 15, 16.

⁴ *Ibid.* §§ 20, 21.

(e) The Act (§ 12) requires that the accounts shall be "subscribed by" the improver. Held, where he died before Martinmas, that they may be signed by his executors; *Breadalbane's Trs.*, 6th June, 1866, 4 M'P. 790. Held also that they may be signed by a factor or commissioner; *Fraser*, 2nd Dec. 1835, 14 S. 89.

annualrent over the estate, to subsist during his own life and twenty-five years after his death, for the legal interest of the three-fourths during his own life, and for £7, 2s. per cent. on the three-fourths for the twenty-five years after his death.¹(f)

(2.) Where the improvements have been executed subsequently to the passing of the Act, the heir may be authorised to grant bond of annualrent, to subsist for twenty-five years after the date of the decree of declarator, at the rate of £7, 2s. per cent. on the *whole sums expended*.²(g) [By the 8th section of the Entail Amendment Act, 1868, the Montgomery Act is declared to be applicable to all entails unless expressly excluded by the deed of entail.]

996. Where the heir making the expenditure has obtained decree for three-fourths, but has died without granting bond of annualrent; For what amount, and for what period, may his executor or assignee require the heir in possession to grant such bond?

A bond of annualrent at £7, 2s. per cent. on the three-fourths payable for the period of twenty-five years after the death of the improver.³(h)

997. To what extent may bond and disposition in security be granted for improvement-money?

¹ 11 & 12 Vict. c. 36, § 13.

² 11 & 12 Vict. c. 36, § 15.

³ *Ibid.* § 14.

(f) Where an heir of entail has applied for and obtained authority to grant bonds of annualrent or bonds and dispositions in security (*infra*, Ans. 997) for improvement expenditure, under 10 Geo. III. c. 51, and dies without having exercised the power to its full extent, his executors may proceed under that Act personally against the succeeding heir for payment of the balance: Breadalbane's Trs., 6th June, 1866, 4 M'P. 775.

(g) The provisions of the 11 & 12 Vict. c. 36, referred to in this and the following answer, apply to estates held under entails dated prior to 1st August, 1848. By § 12 of that Act it is declared that the 10 Geo. III. c. 51 (Montgomery Act), shall not be applicable to any tailzie dated on or after 1st August, 1848; but by 16 & 17 Vict. c. 94, § 12, it is enacted that where the maker of any tailzie executed after 1st August, 1848, has declared or shall declare that the 10 Geo. III. c. 51, shall be applicable to such tailzie, then, and in that case, such Act shall be applicable to such tailzie as if it had been executed prior to 1st August, 1848.

(h) See note (f), *supra*.

Bond and disposition in security may be granted for two-third parts of the sum on which the amount of a bond of annual-rent, if granted, would be calculated.¹

998. Is the heir in possession under a new entail entitled to grant provisions to his wife and children under the Aberdeen Act?

Unless the entail contain a declaration that the Aberdeen Act is to apply to the entail, the heir in possession has no power to grant provisions under the statute; as neither the Aberdeen Act nor the Montgomery Act, in the absence of such a declaration, is applicable to new entails.² [See additions to Answers 980 and 995.]

999. Is the heir in possession under a new entail, containing a general prohibition against alienation and long leases, entitled to grant a building lease?

Where the entail does not expressly prohibit the granting of building leases,⁽ⁱ⁾ the heir in possession under a new entail has the same statutory powers of granting building leases as are possessed by heirs under old entails.^{3(j)}

1000. Explain the nature of the limitation imposed on trust rights, liferent rights, and leases by the Entail Amendment Act, 1848.

(1.) Trust rights and liferent rights are limited to the persons in life at the date of the deed; and a party born after that date is entitled, when of full age, to hold the subject as fee-simple proprietor, and may obtain act and decree of the Court to that effect, which, when recorded in the Register of Sasines, operates as a disposition and infeftment in his favour, the rights of superiors and others, holding rights independently of the deed by which the trust or liferent is constituted, being reserved entire.⁴

¹ 11 & 12 Vict. c. 36, § 18.

² 16 & 17 Vict. c. 94, § 13.

³ 11 & 12 Vict. c. 36, § 12; 16 & 17 Vict. c. 94, § 12.

⁴ 11 & 12 Vict. c. 36, §§ 47, 48.

(i) Though it prohibits alienation and long leases generally.

(j) The 16 & 17 Vict. c. 94, § 13, confers the same power as to granting feus where not expressly prohibited.

(2.) Where land is held in lease, either directly or by trustees for his behoof, by a party of full age, born after the date of the deed, such party, it is declared, shall not be in any way affected by any conditions or prohibitions intended to regulate his succession, or to abridge his possession or enjoyment in favour of any future heir; the right of the proprietor to enforce *bona fide* stipulations being reserved.¹

1001. What are the rights of heirs with reference to money vested in trust for the purchase of land to be entailed?

Money vested in trust for the purchase of land to be entailed is dealt with as entailed land; and the person who would be heir under the entail is entitled to apply to the Court for warrant for payment of the money with or without consents, as is required in the case of a disentail.²

1002. What are the steps of procedure by which the next substitute completes a title to the estate if a prior substitute contravene?

(1) Declarator of contravention; (2) reduction of contravener's title; and (3) service as heir of entail to the last member infert who did not contravene.³

1003. How may entails be extinguished?

(1) By prescriptive possession on a fee-simple title, (k) or on titles made up under the entail from which the fetters have been omitted. (2) By devolution of the estate on the last [*nominatim*] substitute. [See § 13 of the Entail Amendment Act, 1875, as to effect of a destination to the institute or heir in possession and his heirs whomsoever or heirs general.] (3) By the succession of heirs-portioners, when these are not excluded. (4) By disentail under the Entail Amendment Act.

1004. What consents are requisite to entitle the heir in possession to disentail, and in what circumstances may he disentail without consents?

¹ 11 & 12 Vict. c. 36, § 49.

² *Ibid.* § 27.

³ Ersk. 3, 8, 32; Menzies Lect. 726 (766).

(k) See *supra*, note (c), p. 341.

1. Under old entails—

(1.) Irrespective of the time of his birth, the heir in possession may disentail, *1st*, without any consent, if he is the only heir in existence at the time, and unmarried [the words “and unmarried” are repealed by the Entail Amendment Act, 1875, § 5, sub-sec. 3]; *2nd*, with consent of the whole heirs, if there be less than three in existence; or otherwise, with consent of the three next heirs entitled in their order to succeed; or with consent of the two next heirs, each of whom in order successively would be *heir-apparent*,—the next heir in all these cases being twenty-five years of age, and under no legal incapacity. [By the 1875 Act, § 4, twenty-one years of age complete is substituted for twenty-five.]

(2.) If the heir in possession is born *before* 1st August, 1848, he may disentail with consent of the heir-apparent, being of the age of twenty-five [now twenty-one], and not subject to legal incapacity, and born *after* 1st August, 1848.

(3.) If the heir in possession is born *after* 1st August, 1848, he may disentail, without any consent, if he is of full age.

2. Under new entails—

(1.) If the heir in possession is born after the date of the entail, and of full age, he may disentail without any consent.

(2.) If he is born before the date of the entail, and is of full age, he may disentail with consent of the heir-apparent being twenty-five years of age [now twenty-one], and not subject to legal incapacity, and born after the date of the entail.¹(*m*)

[1005. What are the provisions of the Entail Amendment Act, 1875, in the case of any of the heirs whose consent to disentail (except the nearest heir for the time) is necessary, declining to consent or being incapable of consenting?

(1.) The money value of such heir's expectancy shall be ascertained at the sight of the Court.

(2.) On ascertainment, it is to be paid into bank on security given on the estate.

¹ 11 & 12 Vict. c. 36, §§ 1, 2, 3.

(*m*) If the petitioner die before the authority of the Court is got to record the instrument of disentail, the proceedings cannot be carried out by his representatives; Robertson, 10th June, 1864, 2 M.P. 1178.

(3.) On these things being done, the Court may proceed as if the consent had been given, § 5, sub-sec. 2.]

1006. What is the definition of the term “heir-apparent” under the Entail Amendment Act?

The term “heir-apparent” is the heir who is next in succession to the heir in possession, and whose right of succession, if he survive, must take effect.¹

1007. Where an heir in possession under an old entail has, by marriage-contract, settled the estate on the issue of the marriage; When may the estate be disentailed?

It is not competent for the heir in possession to apply for disentail until there shall have been born a child of the marriage, capable of taking the estate in terms of the contract, and who, by himself or his guardian, shall consent to such disentail; or until the marriage shall be dissolved without such child being born, unless the trustees named in the contract shall concur in the application.² [The 1875 Act, § 5, sub-sec. 3, specially provides that nothing therein contained is to affect § 8 of the Rutherford Act.]

1008. What is the effect of the recorded instrument of disentail?

(1.) It absolutely frees and disencumbers the entailed estate and the heirs of entail of all the prohibitions, restrictions, and clauses irritant and resolute, and entitles the heir in possession to alter the course of succession, and to dispoise or burden the estate onerously or gratuitously, and do any other act competent to a fee-simple proprietor.

(2.) It saves the effect of burdens and encumbrances, rights and interests, held by third parties affecting the fee or rents, or the heir in possession, or his successors, other than the rights and interests of the heirs-substitute of entail in or through the tailzie.³

1009. An instrument of disentail was duly expedite and recorded by the heir in possession, and after his death the estate was claimed by his heir-at-law and by the next substitute under the entail; To whom does the estate belong?

¹ 11 & 12 Vict. c. 36, § 52.

² *Ibid.* § 8.

³ *Ibid.* § 32.

The estate belongs to the next substitute; because although the heir in possession, after recording the instrument of disentail, is entitled to alter the course of succession, the registration of the instrument does not *per se* have that effect. The order of succession must be altered by a new conveyance, otherwise the estate will devolve in simple destination upon the substitutes prescribed by the entail.⁽ⁿ⁾

1010. How may a creditor in an entailer's debt protect himself against the effect of disentail?

He may protect himself by inhibition; and if he use that diligence within a year after the registration of the instrument of disentail in the Register of Tailzies, no debt or charge on the estate, which would not have competed with his debt had the disentail not been recorded, can compete with it by reason of the recording of the instrument of disentail.¹

1011. Is it necessary that the title of an heir executing and recording a disentail should be complete?

The Entail Amendment Act provides that all proceedings under the Act may be taken although the entail is not recorded, or the heir infeft.² But when the heir in possession is in apparency, the disentail will not have complete effect unless validated by his subsequent infeftment.³

[1012. What are the provisions of the Entail Amendment Act, 1868, as to liferents of personal estate in Scotland?

(1.) A liferent of personal estate can only be constituted or reserved by means of a trust or otherwise in favour of a party in life at the date of the deed.

(2.) For the purposes of the Act the date of a *mortis causa* deed is to be the death of the granter, and of a marriage-contract the date of the dissolution of the marriage.

¹ 11 & 12 Vict. c. 36, § 7.

² Duff's Entails, 95.

³ *Ibid.* § 42.

(n) This is in terms of § 32, which, while it frees and relieves the estate and the heir in possession of the prohibitions, conditions, &c., leaves the destination unaffected until such heir shall exercise the power of altering it.

(3.) Trustees are to be bound to deliver and convey absolutely to a party to whom the liferent is given when of full age, if born after the date of the deed ; § 17.]

[1013. What are the powers conferred by the last-mentioned Act on heirs-apparent as to provisions to widows and children ?

The heir-apparent, with consent of the heir in possession, may avail himself of the provisions of the Aberdeen Act, or of the powers in the entail, provided that such provisions shall not affect provisions granted by the heir in possession, and shall be postponed thereto, § 6.]

VII. CONFIRMATION OF EXECUTORS.

1014. What is confirmation ?

Confirmation is the sentence of a Sheriff, as commissary, authorising an executor (one or more) to recover and administer the moveable estate of a person deceased, for behoof of themselves, or of others interested.¹ [Commissary-courts are abolished by the Sheriff Courts Act, 1876, § 35, and the jurisdiction of each Commissary-court is transferred to the corresponding Sheriff-court.]

1015. What was the quot of testaments ?

The quot of testaments was the twentieth part of the moveable estates of deceased persons falling to the bishop of the diocese, on granting confirmations, before the administration of such estates was taken out of the hands of the Church.²

1016. In what commissariat must the testament of the defunct be confirmed ?

(1) The testament must be confirmed in the commissariat where the defunct had his domicile at the time of his death. (2) If the deceased was domiciled abroad, confirmation is expedite in the commissariat of Edinburgh, as the *commune forum*. (3) If he went abroad with an intention to return, it is expedite in the commissariat where he last resided before he left the country.³

¹ Ersk. 3, 9, 27.

² *Ibid.* 3, 9, 28.

³ *Ibid.* 3, 9, 29.

1017. Enumerate the different kinds of executors, in their order of preference.

(1.) Executors-nominate.

(2.) Executors-dative, in the following order :—

1st, The universal legatory or general disponent; 2nd, the next of kin;(p) 3rd, when the next of kin do not compete for the office, their children or other descendants are entitled to the appointment; 4th, the widow; 5th, creditors of the deceased; 6th, special legatees; and, 7th, judicial factors.¹ It appears to be doubtful whether the deceased's father, mother, and brothers or sisters uterine, when entitled, under the 3rd, 4th, and 5th sections of the Intestate Moveable Succession Act, to participate in the deceased's succession, are likewise entitled to be conjoined in the office of executor with the next of kin.(r) If these relatives have that right, they would be preferred in their order after the widow.

1018. What is meant by a testament-testamentar, and a testament-dative?

(1) A testament-testamentar is the confirmation of an executor-nominate. It proceeds on the narrative of the will, or other deed of appointment, and ratifies, approves, and confirms the nomination therein contained. (2) A testament-dative is the confirmation of an executor of a person who has died without naming one. It is preceded by a decree-dative, decerning the executor to the office.²

1019. What is the procedure in obtaining confirmation as executor-nominate?

The executor lodges with the commissary-clerk an inventory

¹ Alexander's Prac. Com. Court, 42.

² Ersk. 3, 9, 32.

(p) Alive, with the representatives of deceased next of kin, if any, who survived the intestate; 4 Geo. IV. c. 98, § 1.

(r) Looking to the terms of § 1 of the 18 Vict. c. 23, which excludes children of predeceasing next of kin from the office where the surviving next of kin claim it, but gives them right to it where the surviving next of kin do not claim it, it would rather appear that the other parties referred to in the answer are not entitled to be conjoined in the office.

of the deceased's personal estate, given up on oath,(s) along with the deed of his appointment,(t) and on these being recorded in the Commissary-court books he obtains, as a matter of course, a testament-testamentar.(u) [These proceedings are now in the Sheriff-court. In Edinburgh there is still a separate Commissary-office.]

1020. What is the procedure in obtaining confirmation as executor-dative *qua* next of kin?

(1) The applicant for the office of executor presents a petition to the Commissary, setting forth the date and place of the defunct's death, and his domicile; and the relationship or other title of the applicant; and praying for the appointment in the character claimed. (2) The petition is intimated by the commissary-clerk, by affixing a copy on the door of the Commissary Court-house,(x) and on the walls of the office of the commissary-clerk, and by the keeper of the Record of Edictal Citations, by inserting in a book kept for the purpose an abstract of the petition, and publishing it along with the Abstract of Petitions for Service.(y) (3) After receiving from the keeper of the Record of Edictal Citations a certified copy of the abstract, the commissary-clerk certifies on the petition that it has been intimated, and published,(z) and, on the expiration of nine days after such certification, the petition is called in Court, and the executor decerned, the decree being extractable on the expiration of three days after it has been pronounced. (4)

(s) If any of the persons named executors are dead or have declined to act, this should be stated in the oath, as otherwise they will be included in the confirmation. Where parties decline to act, evidence of this (by letter or otherwise) is generally required to be produced.

(t) And other deeds relating to the succession.

(u) If after giving up the inventory other effects are discovered, an additional inventory must be exhibited on oath; 48 Geo. III. c. 149, § 38; and an eik to the testament, if required, is thereupon granted.

(x) "Or in some conspicuous place of the Court, and of the office of the commissary-clerk."

(y) The particulars to be entered in the Abstract are transmitted by the commissary-clerk to the keeper of the Record of Edictal Citations.

(z) "Where a second petition for confirmation is presented in reference to the same personal estate, the commissary shall direct intimation of such petition to be made to the party who presented the first petition;" 21 & 22 Vict. c. 56, § 5.

After lodging an inventory of the personal estate, (a) and finding caution for his acts and intromissions, the executor obtains a testament-dative.¹ [See addition to last Answer.]

1021. What is the procedure in expediting confirmation as executor-creditor?

1. Where the debt was due by deceased—

(1.) Where the debt is liquid—the document of debt must be narrated in and produced with the petition; and, besides the ordinary publication, the petition must be notified by advertisement in the Edinburgh Gazette, and a copy of the Gazette produced in Court. In the oath upon the inventory, the creditor is required, by the Commissary's Instructions of 31st December, 1823, to depone to the verity of the debt, but it has been held that this is not indispensable, as it is not required by 4 Geo. IV. c. 98.² In other respects the procedure is the same as in the case of confirmation as executor *qua* next in kin. Unlike other confirmations the confirmation of an executor-creditor may be partial,—of as much of the estate as will satisfy his debt, with expenses.

(2.) Where the debt is illiquid,—the creditor before presenting his petition, must constitute his claim by decree in an action of constitution against the next of kin of the defunct, the action being preceded by a charge to confirm within twenty days. (b) Such a charge, although abolished in the case of a constitution and adjudication against an unentered heir, appears still necessary in the case of a confirmation as executor-creditor.³ (b) The decree of

¹ 21 & 22 Vict. c. 56, §§ 2, 4, 5, 6.

² Turnbull, 27th June, 1850 (12

³ Greig, 1st March, 1837 (15 S. D. 1097).
697).

(a) And deeds, if any, relating to the succession.

(b) This is under the Act 1695, c. 41, which gives creditors the alternative of requiring the Procurator-Fiscal to confirm and assign to them. The question as to the necessity for such a charge was raised but not decided in Turnbull, cited, note 3; but it was held that where the next of kin do not appear, and decree passes in absence *cognitionis causa* without a charge, it does not *per se* constitute the debt so as to support a claim in a sequestration, and opinions were expressed that, even where preceded by such a charge, it was merely the first step of diligence, and that if the party obtaining it were appointed executor-creditor, he would require thereafter to prove his debt by proper vouchers like any other creditor claiming under the diligence.

constitution is produced with the petition, and in other respects the procedure is the same.

2. Where the debtor is living, and confirmation is to be expedite to a predecessor of the debtor, to whom he has succeeded, but has not confirmed—

(1.) Where the debt is liquid,—the petition is presented to the Commissary of the deceased predecessor's domicile, and craves that the creditor be decerned executor-dative of the predecessor *qua* creditor of his next of kin.

(2.) Where the debt is illiquid,—the creditor, before presenting the petition, must constitute it against the debtor by decree of any competent Court.¹

1022. How can other creditors obtain *pari passu* rights with the executor-creditor confirming?

(1) By being conjoined in the office of executor-creditor with the creditor confirming; or (2) by citing the executor-creditor to communicate what he may have recovered;² or (3) by sequestration of the deceased's estates under the Bankrupt Act within seven months of his death, which cuts down the confirmation.^{3(c)}

1023. A dies leaving a testament in favour of B, and B dies without confirmation, intestate; How does C, the next of kin of B, make up a title?

C must first get himself decerned and confirmed executor-dative of B, including in the inventory the amount or *universitas* of the succession of A; and then obtain himself decerned and confirmed executor-dative of A, the inventory in this case containing the *particulars* of A's personal estate.^{4(d)}

¹ Alexander's Pract. 93.

² A. S., 28th Feb. 1662.

³ 19 & 20 Vict. c. 79, § 110.

⁴ Alexander's Pract. 90.

(c) A creditor wishing to be decerned executor, to the exclusion of a prior applicant, may present a separate petition for this purpose.

(d) The proceedings in these answers refer to the case of the party named executor and universal legatory or residuary legatee. In the case of an executor-nominate in trust, unless the appointment were so conceived as to give the executor's executor a title to the office, either the next of kin of A or the beneficiaries in his succession would apply for the office, or a judicial factor would be appointed, who would get himself decerned executor-dative.

1024. What would have been the procedure if B had left a testament in favour of C?

The procedure would have been the same as in the last case, with the exception that C, instead of expediting confirmation as executor-dative to B, would obtain a testament-testamentar.¹(d)

1025. Is it necessary to obtain probate for personal estate situated in England, which belonged to a person who has died domiciled in Scotland?

No; it being enacted by the Confirmation and Probate Act, 1858, that when any confirmation of executor of a person who shall be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England, shall be produced in the principal Court of Probate in England, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the Commissary, finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the Court, and returned to the person producing it, and shall thereafter have the like force and effect in England as Probate, or letters of administration.¹(e) [A finding by the Sheriff that the deceased died domiciled in Scotland is not now necessary. That fact is to be set forth in the affidavit to the inventory, and being so set forth is a sufficient warrant to the Sheriff-clerk to insert in the confirmation, or to note thereon and sign, a statement that the deceased died domiciled in Scotland. Sheriff Courts Act, 1876, § 41.]

1026. Where personal estate, situated in Scotland, which belonged to a person who has died domiciled in England, has been included in the probate granted to his executor; Is it necessary to expedite confirmation for such personal estate?

¹ Alexander's Prac. 91.

² 21 & 22 Vict. c. 56, § 12.

(e) Personal property situated in Ireland also may be included in the inventory, the confirmation in this case being produced in and sealed with the seal of the Court of Probate in Dublin.

In all cases the property in the different countries is stated separately in the inventory, and duty is paid on the aggregate amount; 21 & 22 Vict. c. 56, §§ 9, 12, and 13.

No; where the probate, or a note or memorandum written thereon, bears that the deceased died domiciled in England, it may be produced in the Commissary Court of Edinburgh, and a copy deposited with the commissary-clerk; and on a certificate being written by the clerk on the probate, of its having been produced and a copy lodged, the probate, being duly stamped, has the same force and effect in Scotland as confirmation.¹ (f)

1027. In what cases is confirmation unnecessary?

(1) To give an active title to the *jus relictæ* and legitim; (2) where the executor is in possession; (3) where the thing or debt has been conveyed by special assignation by the deceased. Special legacies are included under this rule. (4) Where the debtor is willing to pay without confirmation, or has granted a bond of corroboration to the next of kin. (5) Confirmation is unnecessary to vest the succession in the next of kin. (6) To entitle an executor to sue for a doubtful claim, it being sufficient to expedite confirmation before extracting the decree.² (g)

VIII. SERVICE OF HEIRS.

1028. What is meant by the terms "heir of line," "heir of conquest," "heirs-portioners," "heir-male," "heir-male of the body," and "heir-female"?

(1.) The term *heir of line* is equivalent to heir-at-law. (h) As opposed to heir of conquest, the term heir of line means the heir who is entitled to succeed to the *feuda antiqua*, or heritable estate to which the ancestor succeeded as heir. *Heir-male of line* means the heir male, excluding the heir of conquest.

¹ 21 & 22 Vict. c. 56, § 14.

² Ersk. 3, 9, 30; Menzies Lect. 468 (488).

(f) This provision of the Act includes the letters of administration (equivalent to the testament-dative), and extends to Ireland.

(g) Where, however, the pursuer is not an executor-nominate he must be decerned executor in order to give him a title to sue.

It will be observed that, whether confirmation is required or not, an inventory of the whole estate must be given up.

(h) Or heir-general.

(2.) The *heir of conquest* is the heir in *feuda nova*—feudal subjects acquired by purchase or gift. (i) Succession to conquest, as contradistinguished from succession to heritage, happens where a middle brother or sister dies, leaving a younger and an elder brother, the younger brother taking the heritage, and the elder the conquest. [By the Conveyancing Act, § 37, it is enacted that the distinction between fees of heritage and conquest is abolished as to all successions opening after the Act (1st October, 1874), and fees of conquest are to descend to the same persons as fees of heritage.]

(3.) *Heirs-portioners* are females in the same degree of propinquity, who succeed to equal shares, *pro indiviso*.

(4.) *Heir-male* is the nearest male heir connected by males, exclusive of females and males connected by females.

(5.) *Heir-male of the body* is the eldest son, or his descendant, being a male connected by males.

(6.) *Heir-female* applies to the heir-at-law, male or female, failing heirs-male.¹

[1029. What are the provisions of the Conveyancing Act, 1874, as to a personal right to lands?

(1.) A personal right to every estate in land descendible to heirs, is to vest in the heir entitled to succeed thereto, without service or other procedure, by his survivance of the person to whom he is entitled to succeed, whether such person should have died before or after the commencement of the Act, provided the heir should be alive at the commencement of the Act. Such personal right is to be of the nature of, and transmissible as a personal right to land, under an unfeudalised conveyance, § 9. See Ans. 980.

(2.) The title of an heir to, or donee of a proprietor having such a personal right, or of any person acquiring from such heir or donee, may be completed as if the person making up a title had held a disposition from the person last infeft to his immediate successor, and a disposition and assignation from each heir or donee intervening in favour of his immediate successor. The Act provides further a form of petition, similar to a petition for service, applicable in such cases, § 10, Schedule E.]

¹ Ersk. 3, 8, 47, *et seq.*; Ball's Prin. 1695; Duff's Entails, 15.

(i) Subjects, though acquired by gift or conveyance, constitute heritage if the party acquiring them was *alioqui successurus*; Ersk. 3, 8, 15.

1030. If lands are destined to the heirs-female of A's body, or to his eldest daughter or heir-female ; or to his eldest daughter without division ; and A dies, leaving a daughter and a grand-daughter by an only son ; Who succeeds ?

(1.) If the destination were to the heirs-female of A's body, the grand-daughter would succeed.¹(*k*)

(2.) If the destination were to his eldest daughter, or heir-female, the grand-daughter would succeed.²

(3.) If the destination were to the eldest daughter without division the daughter would succeed.³

1031. Lands are destined to the heirs-male of A's body, whom failing, to the heirs-female of his body ; and A dies, leaving a grand-daughter by his eldest son, and a grand-daughter by his second son ; Who succeeds ?(*l*)

The grand-daughter by the eldest son, being the heir-female of A.⁴

1032. Lands are conveyed by a stranger to A, whom failing, to B, and his heirs whomsoever ; A succeeded, and died, leaving a son, B having predeceased him without issue. The lands were claimed by A's son and by B's brother ; To whom do they belong ?

The lands belong to B's brother ; A's heirs not being called.⁵

1033. Lands are destined to A, and the heirs-male of his body, and the heirs whatsoever of the bodies of the

¹ Duff's Entails, 16.

F.C. ; aff. 26th Feb. 1812 (5 Pat.

² Lyon, 19th June, 1739, 5 B. S.

579).

663.

⁴ Ersk. 3, 8, 48 ; Bell's Prin. 1699.

³ Lady Essex Ker, 13th Nov. 1810,

⁵ Ersk. 3, 8, 44.

(*k*) See case of Bargeny (Hope), H. of L., 27th March, 1739, 1 Cr. and St. 237 ; reversing judgment of Court of Session, 11th July, 1738, Elchies, Prov. 6, Heirs, 2.

(*l*) There is obviously some mistake in this question, and it is not easy to say what it should be. There can be no doubt that in the circumstances stated the grand-daughter by the eldest son is entitled to succeed ; but the difficulty is to see how any question could arise out of them.

said heirs-male. The eldest son succeeded, and died, leaving a brother and a daughter ; Who will succeed?

The daughter ; as being the heir whatsoever of A's body.¹

1034. Lands are conveyed by A to his son B and his heirs-male, whom failing, to the heirs-female of the body of A. On B's death, without issue, the lands were claimed by his brother and by A's daughter ; To whom do they belong ?

To B's brother ; as the heir-male general of B.²

1035. What is the construction of a destination to "A, my oldest son, and his lawful children, in equal proportions ?"

A is sole fiar, and not merely a joint-disponee with his children.³

1036. An estate is destined to A, and the heirs-male of his body, whom failing, to B, and his lawful heirs-male, whom failing, to the heirs-female of C ; and a competition arises betwixt the younger brother of B and the daughter of C ; Who will be preferred ?

The younger brother of B, as being his heir-male general, will be preferred to C's heir-female ; the term "lawful heirs-male" not being limited to heirs-male of the body.⁴

1037. An estate is destined to A, and the heirs-male of his body, whom failing, to the heirs-female of his body ; and a competition arises between a daughter of a son and a daughter of the granter ; (o) Who will be preferred ?

¹ Lockhart, 19th Jan. 1837, F.C. ;
and 24th Jan. 1840, 2 D. 877.(m)

⁴ Hay, M. 2315, aff.(n) ; Duff's
Entails, 23.

² Hay, M. 2315.

³ Edward, 12th Feb. 1848, 10 D.
685.

(m) Bell's Prin. § 1700.

(n) 7th April, 1789, 3 Pat. 142.

(o) This question, as it stands, is hardly intelligible, as there is nothing

The daughter of a son will exclude the daughter of the granter, as the former is the nearest heir-female of A.¹

1038. What is the nature and object of special and of general service?

(1.) Special service is a judicial proceeding for establishing the heir's right to succeed to particular subjects, in which his ancestors died feudally vested, and so entitle him to demand a renewal of the investiture from the superior. But it does not take the feudal right out of the *hæreditas jacens* of the ancestor, and its effect is lost if the heir die without having been vested by sasine or registration.(p) [It has now the effect of a disposition by the person deceased in favour of the heir who has obtained the service; Consolidation Act, 1868, § 46.]

(2.) General service is used for establishing the general character of heir without reference to any particular subjects, and for connecting the heir with the unexecuted warrants contained in his ancestor's title; so as to enable him, in virtue of these warrants, to complete a feudal investiture. These, as well as all other personal rights to land, general service effectually transmits to the heir, in whose *hæreditas jacens* they will remain after his death, although they should not have been feudalised in his person. It likewise carries all heritable subjects which do not

¹ Duff's Entails, 25.

in the statement of the destination to show that the granter's heirs, with one of whom the competition is said to arise, can have any interest in the succession. Probably A is to be understood as the granter, and in that case the question will represent the point that arose in the case of Bargeny (*supra*, note (k), Ans. 1030). Here an estate was, after some destinations which did not take effect, destined in favour of the heirs-male of the body, whom failing, the eldest heir-female of the body of the maker, and the son having died without male issue, the question arose whether, under the destination to heirs-female of the body, the succession devolved on the maker's grandson by his own daughter, or his great-grandson by the son's daughter. The Court of Session at first found that the destination carried the estate to the great-grandson, but afterwards that it carried it to the grandson. The House of Lords reversed this judgment on appeal, and confirmed the first, in favour of the great-grandson.

(p) So held, Moreton's Trs., 19th July, 1854, 16 D. 1108.

require for their completion a registered title.¹(*r*) [By section 31 of the Conveyancing Act, 1874, a decree of general service has now the effect of a general disposition *mortis causa* by the proprietor last infeft in favour of the heir; and such services may be used as links in the same way as general dispositions.]

1039. What rights are transmitted *ipso jure* without service?

(1) Allodial rights; (2) honours and dignities; (3) unregistered leases;(*s*) (4) heirship moveables [now abolished]; (5) A *jus crediti* under a marriage-contract;(*t*) (6) moveables made heritable *destinatione*.²

1040. What was the procedure in expeding services before the Service of Heirs Act came into effect?

(1.) The claimant obtained a brieve from Chancery, directed, in the case of special service, to the sheriff of the county where the lands lay, or to the Sheriff of Edinburgh,(*u*) and, in the case

¹ Stair, 3, 5, 25; Bell's Prin. 1824
et seq.; Duff's Feud. Conv. 443.

² Ersk. 3, 8, 77; Bell's Prin. 1825;
Menzies Lect. 750 (792).

(*r*) Formerly a special service included a general one in the same character, but this effect is now limited to the particular lands, &c.; 10 & 11 Vict. c. 47, § 23.

(*s*) By the 20 & 21 Vict. c. 26, § 8, it is provided that "it shall be *competent* to the heir who shall have been served by general or special service" to expedite and record a notarial instrument in the form directed, which "shall complete the title of such heir;" but it is not made imperative to follow this course, and by § 7 the heir's title may be made up *ab intestato* by writ of acknowledgment from the proprietor. Where the heir wishes to assign the lease, either absolutely or in security, he must, under the provisions of §§ 3 and 4, complete his title in one of these ways, but in other respects the law is not changed by the Act in question, and there seems no reason to doubt that for the mere transmission of the right a registered as well as an unregistered lease vests in the heir *ab intestato* without service.

(*t*) So found, Ogilvy, 16th Dec. 1817, F.C.; but if the obligation in the contract has been implemented by the stipulated sum being laid out by the father, the children cease to be creditors, and must take up the provision by service. In the same way the *jus crediti* under a trust-deed vests without service, and the party in right of it may proceed at once against the trustees to compel them to denude; Gordon's Tra., 4th Dec. 1821, 1 S. 185. A bond payable to A, whom failing, to B, passes to B without service, but later substitutes require service to instruct the failure of the prior ones; Stair, 3, 5, 6; Ersk. 3, 8, 73.

(*u*) This form, which was substituted for that of service before the Macers,

of general service, to any Judge Ordinary, to try the validity of the claimant's title by an inquest or jury. (2) The brieve was executed edictally at the market-cross of the head burgh of the jurisdiction within which the service was to be expedite. (3) The service proceeded on a claim, in which the party answered (x) the different heads of the brieve (see Ans. 1041 and 1042), and adduced the necessary proof to the jury. (4) The jury pronounced a verdict finding the claim proved. (5) The service and brieve were retoured (y) to Chancery, and an extract-retour given out, which was the heir's evidence of the service.¹

1041. What were the heads of the brieve in special service ?

(1) The death of the ancestor at the faith and peace of the sovereign ; (2) the propinquity of the claimant ; (3) the claimant's lawful age ; (4) the extent and valuation of the land ; (5) the superior ; (6) the tenure and reddendo ; (7) the person in whose hands the lands have been since the death of the ancestor.²

1042. What were the heads of the brieve in general service ? (z)

(1) The death of the ancestor at the faith and peace of the sovereign ; (2) the claimant's propinquity ; and (3) his lawful age.^{3(a)}

¹ Ersk. 3, 8, 67 ; Duff's Feud. Conv. 455 *et seq.*

² Ersk. 3, 8, 57 ; Bell's Prin. 1828.

³ Bell's Prin. 1849.

was competent only where the lands lay in different counties ; 1 & 2 Geo. IV. c. 38, § 11. The proceedings were regulated by A. S., 25th Feb. 1824. The Court for the service was held in the Court-room of one of the Divisions of the Court of Session, and a W.S. officiated as clerk ; A. S. § 3.

(x) Or rather set forth the grounds on and the lands in which he claimed to be served heir under the different heads of the brieve. It was the inquest who answered the inquiries contained in the brieve.

(y) If the verdict was negative to the claim, no retour was made.

(z) The terms of the brieve never varied, except as to the degree of relationship and the character in which the heir was to be served, but in general services the last four heads of the brieve were not answered.

(a) It was assumed that the ancestor died at the faith and peace of the Sovereign, and the question as to the heir being of lawful age was always answered in the affirmative, this being, after the abolition of ward-holding, a point of no importance.

1043. What now is the procedure in expediting a special service ?

(1.) A petition for the claimant(*b*) is presented to the Sheriff of Chancery, or to the sheriff of the county where the lands lie, setting forth, *1st*, the death of the ancestor ; *2nd*, the date of his death ; *3rd*, the description of or (under the Titles Act¹) a reference to the subjects ; *4th*, the ancestor's title ; and *5th*, the claimant's propinquity, and, in the case of service as heir of provision, the deed under which the claimant has right.

(2.) The petition is published edictally in Edinburgh and in the county.

(3.) The ancestor's death and the claimant's propinquity are proved ; the evidence being either led before the sheriff, or taken by a magistrate of any city or burgh,^(d) or by a special commissioner.^(e)

(4.) Decree of service is pronounced by the sheriff.

(5.) The proceedings are transmitted to Chancery, and an extract-decree is thence issued, which is the legal evidence of the service. [The proceedings are now under the Consolidation Act, 1868, § 27 *et seq.*]

1044. Before what judge may a general service be expedite, and what particulars does the petition set forth ?

General service may be expedite before the Sheriff of Chancery or the sheriff of the county of the deceased's domicile. The petition sets forth (1) the death of the ancestor ; (2) the date of death ; (3) the ancestor's domicile, or, if the ancestor died upwards of forty years before the date of presenting the petition, and the domicile is unknown, that the petitioner is unable to prove the domicile ; and (4) the propinquity of the claimant.³ [Consolidation Act, § 27 *et seq.*]

¹ 21 & 22 Vict. c. 76, § 15.(c)

³ 10 & 11 Vict. c. 47, §§ 3, 4 ; 21 &

² 10 & 11 Vict. c. 47, § 3 *et seq.*

22 Vict. c. 76, § 30.

(b) Signed by him or a mandatory specially authorised.

(c) This section is repealed by § 34 of the 23 & 24 Vict. c. 143.

(d) "By the provost or any of the bailies of any city or royal burgh."

(e) No evidence can be led till the *induciae* have expired, which, where the deceased died in Scotland, are fifteen days after the latest date of publication, or where publication is to be made in, or the petition is presented to the Sheriff of, Orkney or Shetland, or where the deceased died abroad, thirty days ; 10 & 11 Vict. c. 47, § 10.

1045. What must be proved in special service ?

(1) The death of the ancestor ; (2) the date of death ; (3) that the ancestor was infert ; (4) the claimant's propinquity.

1046. What must be proved in general service ?

(1) The death ; (2) the date of death ; (3) the ancestor's domicile ; (4) the propinquity. The Titles Act provides that if the deceased died upwards of forty years [now *ten* years, Consolidation Act, § 34] prior to the date of presenting the petition, it shall not be necessary to state or prove the deceased's domicile, but that it shall be sufficient to state in the petition, and, if required, to make oath that the petitioner is unable to prove the domicile.¹

1047. In what case is it necessary to expedite service in the Sheriff-Court of Chancery ?

(1) In special services, where the lands lie in different counties.
(2) In general services, where the deceased's domicile was furth of Scotland,² or cannot be proved.³ [Consolidation Act, §§ 28 and 34.]

1048. Where a claimant in a disputed succession wishes the case disposed of by jury trial, how does he proceed ?

Before the proof is begun to be taken by the sheriff, the claimant presents a note of advocation to the Court of Session, praying the Court to advocate the proceedings, in order that the case may be tried by a jury ; the subsequent procedure being the same as on notes of advocation presented with a view to jury trial against judgments of the Sheriff-courts.⁴(f) [Consolidation Act, § 41.]

1049. Where a person, not the lawful heir, has obtained infertment in virtue of a service of precept of *clart constat*, may the true heir serve ?

(1.) If the service on which the infertment has passed is in the proper character, though otherwise objectionable, the true

¹ 21 & 22 Vict. c. 76, § 30.

² 10 & 11 Vict. c. 47, § 3.

³ 21 & 22 Vict. c. 76, § 30.

⁴ 10 & 11 Vict. c. 47, § 17.

(f) This course may be taken also by any person competently appearing (§ 16) to oppose any petition of service.

heir is excluded from serving in special until reduction of the infeftment ; as such service is incompetent when the fee is full.¹

(2.) It has been held that he may serve heir in general, to give him a title to reduce ;² but it has been subsequently found that the second service carries nothing, and that it is not necessary for the pursuer of a reduction of a general service to expedite a general service in his own favour.³(g)

(3.) Infeftment on a precept of *clare constat* not proceeding on service appears to be insufficient to exclude service in special, as the investiture is the mere act of the superior.⁴

1050. By a delivered deed A disponed to himself, whom failing, to B, whom failing, to A's heirs-male. On the death of A (B having predeceased him), his heir-male expedite service as "nearest and lawful heir-male in general of A," and took infeftment on the deed ; Was his title valid ? State the reason.

No ; because the service ought to have been as heir-male of provision ; a service as heir-male simply not proving that B had failed.⁵(h)

1051. Under a destination to A and heirs-male of his body, Would service by his eldest son be valid if it were expedite as "nearest and lawful heir of line of A ;" or as "nearest and lawful heir of line of A, *his father*" ?

(1.) Service as "nearest and lawful heir of line of A" is inept ; because it does not prove that the heir is an heir-male of the body

¹ Cunningham, 27th Feb. 1812, F.C. ; Bell's Prin. 1830 and 1840 ; Duff's Feud. Conv. 445.

² Wilson, 11th Feb. 1851, 13 D. 636.

³ Macara, 15th Feb. 1848, 10 D. 707.

⁴ M'Callum, M. 16135 ; Bell's Prin. 1840.

⁵ Ersk. 3, 8, 74 ; Duff's Feud. Conv. 471.

(g) A party may pursue a reduction of adverse titles at least where his propinquity is admitted ; Rutherford, 12th Nov. 1830, 9 S. 3 ; Young, 16th Jan. 1844, 6 D. 370. See also Paterson's Trs., 1st Dec. 1854, 17 D. 117.

(h) The object of a service is not to prove facts, but to take a right, though for this purpose it is necessary to prove certain facts. The service here should have been as heir of provision, because it was only under the special deed that the heir had right to the succession.

of A.¹ (2) But service of the eldest son as "nearest and lawful heir of line of A, *his father*," has been sustained; because the service proved not only the heir's universal right, but that he was heir-male of the body of A.²

1052. Where one is erroneously served heir of provision instead of heir of line, Will that invalidate the service?

No; provided the decree of service contain evidence that the party possesses both characters.³ [See also Ans. 1087.]

1053. Is it necessary, in a general service as heir of provision, to specify the particular deed of provision?

Formerly such a specification was unnecessary,⁴ but it is now indispensable.⁵ [Consolidation Act, § 29.]

1054. A, by a delivered deed, but under reservation of his liferent, disposed to B, whom failing, to C. B predeceased A. How does C make up his title?

C will serve as heir of provision in general to B; and being thus in right of the unrecorded conveyance by A he will be feudally vested by infeftment on the transmitted precept, or [by notarial instrument, Consolidation Act, Schedule (J).]

1055. A, infeft, disposes to the heirs of his body, whom failing, to B, whom failing, to C, whom failing, to D. B serves as heir of provision in general to A, and possesses on the personal title; C succeeds and possesses on apparenancy; On the death of C, how will D make up his title?

[Before the Conveyancing Act, D, passing over C, would serve as heir of provision in general to B, and take infeftment on the transmitted precept, or expedite a notarial instrument. Since the Conveyancing Act, he can either adopt that course or avail himself of the personal right vested in C, and connect himself with C by petition in the form of Schedule E of that Act, and registration with warrant, of the decree to follow thereon.]

¹ Edgar, M. 14015; 2 Ross, L.C. 522.

² Haldane, M. 14443; 2 Ross, L.C. 564.

³ Bell, M. 14016; 2 Ross, L.C. 549.

⁴ Hay, M. 14369; 2 Ross, L.C. 563.

⁵ 10 & 11 Vict. c. 47, § 4.

1056. By *mortis causa* settlement, which remained undelivered till the granter's death, lands are disposed to A, B, and C, successively, and the heirs of their bodies; A and B predeceased the granter without issue; How is C to make up his title?

It is still unsettled whether, in this case, C is a conditional institute or a substitute. If he possesses the former character, he may be feudally vested by infeftment on or registration of the deed, without service; but if he is a substitute, he must first serve as heir of provision in general to A, the institute. Until the question is authoritatively determined, it will therefore be prudent to expedite an alternative title, (1) as conditional institute, by direct infeftment or registration; and (2) as substitute, by service as heir of provision in general to A, and infeftment or [notarial instrument, Consolidation Act, Schedule (J)].(l)¹

¹ Colquhoun, 8th July, 1831, 9 S. 18th Aug. 1843, 2 Bell's App. 195; 911; 2 Ross, L.C. 57; Fogo, 25th Feb. 1840, 2 D. 651; (k) H. of L., 2 Ross, L.C. 36.

(k) See opinions of judges, under remit, from H. of L., 11th March, 1842, 4 D. 1068. See also Dennistoun, 5th Feb. 1824, 2 S. 678.

(l) With the cases of Gordon of Carleton, M. 14366; Peacock, 22nd June, 1826, 4 S. 742, and Colquhoun and Fogo, here cited, standing on the books, it is impossible to say with certainty what is C's character, and consequently how the title should be made up in the case here put. The course laid down, or rather perhaps suggested, in Colquhoun, of a declarator to prove the party's right as conditional institute, may be laid out of view, the judges having all concurred in opinion (in Fogo) that it is unnecessary. Such a decree cannot have the effect of vesting any right which had not previously vested. The judgment in Fogo having been carried by appeal to the House of Lords, was remitted for the opinion of the whole Court on certain questions, and in conformity with the opinions so given, and which are reported 11th March, 1842, 4 D. 1068, the case was disposed of in the Court of Appeal. The judgment and opinions now referred to suggested a mode of making up titles in such cases which obviated the difficulty arising from the uncertainty of the law applicable to them, and may be adapted to the case supposed. In Fogo the heir or substitute who first succeeded made up her title, proceeding on the assumption that the right had vested in the *nominatim* institute or donee, to whom she accordingly served heir of provision in general, and holding that she had thereby acquired right to the open procuratory, expedite a charter of resignation, and took infeftment thereon. The judges of the Court of Session held unanimously that she had thus made up a valid feudal title, because, if she was a substitute, her service carried right to the procuratory, while, if she was conditional institute, she had

[See the opinion of the Court, delivered by Lord President Inglis, in *Hutchison*, 11 M.P. 229. "The Court are of opinion that when a person by *mortis causa* conveyance in the ordinary form disposes to the heirs of his body, or the heirs-male of his body, whom failing to a person named, the person so named (there being no heirs of his body then existing) is conditional institute; and if no heirs of the body of the granter come into existence, or existing predecease him, the condition is purified, and the person named is, on the death of the granter, without qualification or condition, disponent, and as such is entitled to use the executory clauses of the disposition for the purpose of feudalising his right as disponent, without service or declarator."]

1057. Under the above destination, how is C to make up his title if A predeceased, but B survived, the granter without making up any title?

He should complete an alternative title:—

(1) On the assumption that B was conditional institute, C will serve to him as heir of provision in general; and (2) on the assumption that the personal right had vested in A, and that B

right to it, and was entitled to use it without any service. In conformity with the view that had thus been adopted and sanctioned in *Fogo*, the practice was, to expedite a service to the institute or disponent, and in the sasine or charter to set forth that the party in whose favour it was had right to the precept or procuratory, either by virtue of the service or as conditional institute or disponent. The principle on which the practice now explained proceeded, and which forms a combination of the two modes proposed in the answer, is equally applicable to the present system of titles. In the case supposed, C should either (1) serve as heir of provision in general to A, after which he has, in one way or other, undoubted right to the disposition, and should then expedite a notarial instrument in the form of Schedule K, and record the conveyance, with a warrant of registration thereon, along with the notarial instrument, in the Register of Sasines. Supposing him to be a substitute, this is the appropriate mode of completing his title, and if, on the other hand, he is a conditional institute, the registration of the conveyance with the warrant is sufficient, and all the rest is superfluous, but harmless. Or, (2) if C prefers making up a title by resignation, he should first serve heir as before, and then get a writ of resignation, in which it will be set forth that he has right to the clause of resignation, either as conditional institute or by virtue of his service.

The course suggested in the answer is correct, but it seems better, if possible, to avoid making up double titles, unless to prevent intricacy or confusion in the deeds. See *infra*, Ana. 1086, and notes (n) and (o).

was a substitute, C, passing over B, will serve as heir of provision in general to A ; the title in each case being feudally completed by sasine or notarial instrument.^(m) [See as to alternative method since the Conveyancing Act, Ans. 1055.]

1058. By *mortis causa* settlement, which remained undelivered till the granter's death, A, infest, disponed 'to the heirs of his body, whom failing, to B, whom failing, to C. A having died without issue, and B having survived him without making up any title ; How will C proceed on the death of B ?

C will pass over B and serve as heir of provision in general to A, in whom it may be held that the fee remains ; on the principle that the destination is the same in effect as if A had first instituted himself.¹ On the other hand, it may be held that B was conditional institute ; in which view, C ought to make up an alternative title by service as heir of provision in general to B, as well as by service to A.²⁽ⁿ⁾ [See Ans. 1055 and addition to Ans. 1056.]

¹ Cra. of Carleton, M. 14366 ; ² Fogo, *supra*.
Menzies Lect. 752 (795).

(m) The alternative mode of completing the title would meet the case, but there seems to be no necessity for making up a double title, as C, after being served heir to A and B, might proceed in either of the ways proposed, (*supra*, note (l)), setting forth his right to the disposition, either as conditional institute or by virtue of the two services, or one or other of them.

One practical inconvenience may arise in applying the principle of conditional institution, which would be avoided if the right were held to vest in the disponent, without reference to survivance—viz., that where there are several parties named prior, in order, to the person making up his title, a mistake as to the order and dates of their deaths might produce a fatal error in the completion of the title. It is only in such cases as are here referred to that any difficulty seems to arise in the practical application of the course suggested (*supra*, note (l)), as deduced from Fogo, and the only way of obviating it and making the title secure appears to be to serve heir to each of the parties who are previously called under the deed, and so take up any right that may have vested in any of them.

(n) The first mode suggested in this answer seems to be the correct one. If A had left heirs of his body, service would have been requisite in their case, and it seems to be equally necessary in the case of B (*supra*, Ans. 1055). If, however, it is thought necessary to fortify C's title by taking up any supposed right that may have been in B, it would still, it is thought, be sufficient to make up one title as suggested, *supra*, notes (l) and (m).

1059. A, infert, disponed to B, who, by a delivered deed, disponed to himself and the heirs of his body, whom failing, to C. B having died without issue, and without completing a title under the conveyance by himself, C completed a title under it, by general service to him and notarial instrument; Specify the writ narrated, and those deduced in the instrument, assuming that B was infert, and assuming that he was not infert on A's disposition to him.

(1.) If B had been infert on A's disposition to him, the notarial instrument expedite by C would narrate the disposition by B, and deduce C's service.

(2.) If B had not been infert on A's disposition, the instrument would narrate the disposition by A to B, and deduce, 1st, the disposition by B, and, 2nd, C's service.

1060. By *mortis causa* settlement, which remained undelivered till the granter's death, A, infert, disponed to himself and the heirs of his body, whom failing to B; How would B make up a title on the death of A's son, assuming (1) that A's son predeceased his father, or (2) survived, but died without making up a title!

A, being institute, B would, on either assumption, serve as heir of provision to A, the service not being special but general; because although A was feudally vested when he granted the disposition, the right to the unexecuted warrants contained in it is personal.(p) [See Ans. 1055 as to alternative method since the Conveyancing Act, if A's son survived.]

1061. By *mortis causa* settlement, reserving the granter's life, lands are disponed to the heirs-male of A, and a series of substitutes. On the granter's death, How does B, the heir-male of A, make up his title!

B will expedite service to A, as heir-male(r) in general, and then complete his title by infertment or notarial instrument; or, it is thought, he may be feudally vested by direct registration of the settle-

(p) Rather because the settlement made a new destination, under which the right remained personal.

(r) Of provision.

ment, the warrant of registration bearing to be "on behalf of B, the nearest and lawful heir-male(r) of A." In this case, however, service apparently is not indispensable, as it transmits no right, which is the only proper purpose of service, but is merely declaratory of B's character as heir-male of A, a fact which may be established by other evidence. Nor is it necessary, if such a service be expedient, that it be "deduced" in the sasine or notarial instrument, a deduction of titles being required only in the case of "heirs, assignees, and successors *having right to the said precepts by general service, or by disposition and assignation, or by adjudication,*"¹ and not in the case of one who takes directly under the deed as disponee.² But while it would be inconsistent with principle to deduce the service as the title by which B has right to the unrecorded conveyance, reference should be made to the service in the instrument thus:—"At Edinburgh there was on behalf of B, nearest and lawful heir-male of A, conform to decree of general service," &c.(u)

¹ 1693, c. 35.

² Fogo, *supra*. See Opinions of Lords Medwyn and Ivory.

(u) The first mode of completing the title here proposed is correct. The other, in all the different shapes in which it is put, seems to be erroneous and incompetent. (1) There can be no direct or *de plano* infeftment or equivalent therefor on a deed in which the party to be infeft is not *nominatim* disponee, therefore a service is indispensable. (2) The object of a service is not to prove a fact, but to take up a right, and where not required for this purpose, is not necessary at all. The purpose of the service here is to take the estate out of the *hereditas jacens* of A, in whom, under the settlement, there was a fiduciary fee. (3) It is necessary to the validity of the infeftment that the service be set forth, because it is only thereby that the heir has right to the precept; and wherever a precept is used by any person in whose favour *nominatim* it is not granted, his title to it must be deduced in the sasine. (4) Any reference to the service, except as a connecting link, would be quite inept, and would not in any way add to the validity of the sasine.

The particular parts of the opinions of Lords Medwyn and Ivory referred to are not mentioned and have not been found; but Lord Medwyn, in his opinion, said (4 D. 1092)—"Say that the conveyance is to the disponent himself for his liferent use allenary, and to his heirs-male in fee, whom failing, to B, with a precept for infefting the heirs-male, whom failing, B. If an heir-male come to exist, not being *nominatim* instituted, he behoved to serve to the disponent, and could not take infeftment without service." Again—"Where the conveyance is direct to the heirs of the disponent's body, whom failing, to B, without any mention of the disponent. If an heir come to exist, the right devolves upon him by survivance;" "but the heir, since he is not *nominatim* institute, must make up titles by service." If the disponent's heirs require service, so must A's, in the case put.

1062. A dispones to B in liferent, and the heirs of his body in fee. On B's death, How does his heir make up a title?

(1.) If infeftment has been taken in terms of the destination to "B in liferent, and the heirs of his body," it is thought that the heir's title may be made up by service, as heir of provision in special to B, and infeftment on, or registration of, the decree.¹

(2.) If no infeftment has been taken on the conveyance, or if the infeftment has been limited to B in liferent, it is thought the title may be made up by service as heir of provision in general to B, and infeftment or notarial instrument.(y)²

¹ Duff's Feud. Conv. 446.

² *Ibid.* 453.

(y) The method of completing the title proposed in this answer is believed to be well established in practice, and seems to rest on sound principle.

1. *Where infeftment has been taken in the terms stated,* The effect of this would be to vest B with a right of fee (*supra*, Ans. 807; Frog, M. 4263; Lillie, M. 4267; Cuthbertson, M. 4279), and in this case the title must be made up by service to him; but assuming that B's right was a mere liferent, still as the fee cannot be *in pendente*, and as A is by the disposition and infeftment divested, though not in all respects so completely as if the disponee were entered with the superior, there is a constructive fiduciary fee in B which must be taken up by service to him. The only other course of proceeding would be by declaratory adjudication, as in the case of a trust where all the trustees have died, and there is no destination to their heirs, but all such proceedings rest on the assumption that the fee is lying in the *hereditas jacens* of the party against whose heirs they are directed, though it is not transmissible to those heirs.

2. *Where no infeftment has been taken, or in such terms as to limit B's right to a bare liferent.*—In this case the precept, or its equivalent, which could have been used by B for the purpose of giving infeftment in fee, is to that extent unexhausted. This follows necessarily from the judgment in Houlditch, 9th June, 1847, 9 D. 1204, where C having disponed to himself in liferent, for his liferent use only, and to the heirs-male of his marriage in fee; but sasine having been given to him simply in liferent for his liferent use only, omitting all mention of the fee, it was held that this gave C a bare liferent and no fiduciary fee, though it was admitted that had the sasine been properly taken, it would have vested him with a fiduciary fee, to the exclusion of his creditors. As, therefore, in the case supposed there is a precept, or its equivalent, which A could have used for infeftment in fee, the right to it must be in his *hereditas jacens*, and capable of being taken up by general service to him, and used by his heir. This point indeed was decided in Dundas, 23rd January, 1823, 2 S. 145, where D having obtained a Crown charter in favour of himself in liferent,

1063. Under a feudalised destination to A and B, spouses, in conjunct liferent (or in conjunct fee and liferent, for B's liferent use allenary), and to C, their son, in fee, with a reserved power to A to sell and dispoise; Must C serve on the death of A?

(1.) Where the destination is to A and B in conjunct liferent, and to C, their son, in fee, service by C is unnecessary; because, although the power to sell and dispoise makes A virtual proprietor, it does not give him the feudal fee, and the nominal fee in C becomes absolute on A's death.¹

(2.) Where the destination is to A and B in conjunct fee and liferent, for B's liferent use allenary, "the matrimonial fee in the husband, with reserved powers, becomes, by the reservation, a feudal fee in his person, which, on his death, must be taken up by special service" of C, as heir of provision.²(z)

1064. Under a destination by A to B in liferent allenary, and to the heirs of his body in fee; How is B's heir to make up a title?

(1) If infeftment has been expedite in terms of the destination, it is thought that the heir may make up a title by service as heir

¹ M'Lean, 5 B. Sup. 444; Wilson, 14th Dec. 1819, F.C.; Duff's Feud. Conv. 195; 3 Ross L.C. 716.

² Duff's Feud. Conv. 446; Wilson, *supra*, 3 Ross L.C. 716.

for his liferent use only, and the heirs-male of his body, born or to be born, in fee, took infeftment simply in favour of himself in liferent, for his liferent use only. Thereafter his heir expedite a general service in the proper character to his father under the charter, and took infeftment on the unexecuted precept; and the title so made up was sustained by the Court as valid. There is one case which may be here referred to, which seems to point to another mode of making up the title where the first infeftment is one only in liferent; *Emalie*, 13th Feb. 1050, 12 D. 724. Here A disposed "to and in favour of myself in liferent, and after my death to B, my son, in liferent, but for his liferent use only, and to the heirs whatsoever of his body in fee." B was infeft "in liferent, for his liferent use only," without any mention of heirs. On his death, C, his son, made up his title as heir of provision to A, his grandfather, passing by his father; and though the validity of the title so made up was not the question involved in the case, and there was no discussion on it, its validity seems to have been admitted. It will be observed, however, that C was heir under the old investiture, which might affect the question.

(z) The destination here supposed would give the husband (A) a right of fee irrespective of the reserved powers.

of provision in special to B, and infeftment or registration of decree.
 (2) If no infeftment has been taken on the conveyance, or if the infeftment has been limited to B in liferent alienary, it is thought the heir's title may be made up by service as heir of provision in general to B, and infeftment or notarial instrument, the fiduciary fee in B's person being personal.¹ But the competency of service is not free from doubt.^{2(b)}

1065. Explain the nature and purpose of a precept of *clare constat*, and a precept from Chancery.

(1.) A precept of *clare constat* is a writ granted by a superior to the heir of the last entered vassal, (c) under which, when completed by infeftment or registration, the heir obtains a feudal investiture without service. The deed proceeds on the narrative of the death of the ancestor, and of the superior's knowledge that the person named in the instrument is nearest and lawful heir to the deceased, and concludes with a precept of sasine, personal to the heir, for his infeftment in the lands. Although a precept of *clare constat* may proceed on the superior's private information, he is entitled to require the heir to produce a service.

(2.) A precept from Chancery is a writ granted by the Crown to the heir of the last entered vassal in crown-holdings, and is similar in its nature to a precept of *clare constat*, but, unlike the latter, a precept from Chancery must be preceded by decree of service, either general or special.

1066. What are the provisions of the Titles to Land Act with respect to writs of *clare constat*?

(1.) Where, according to the former law and practice, precepts from Chancery, or precepts of *clare constat*, were in use to be granted, it is sufficient to grant a writ of *clare constat* in the form of Schedule G, and to record the writ with a warrant of registration in the Register of Sasines.

¹ Dundas, 28rd Jan. 1828, 2 S. 145;
 Duff's Feud. Conv. 447.

² More's Notes, 211; 3 Ross L.C.
 671.

(b) See *supra*, note (y), Ans. 1062.

(c) It is not necessarily to the heir of the last entered vassal; there may have been a series of intervening conveyances with base holdings, which will be evacuated by the confirmation operated by the precept.

(2.) Such recorded writ is declared to have the same effect as a precept from Chancery, or a precept of *clare constat* followed by infetment.

(3.) Superiors are bound to grant such writs, provided that the heir shall produce a charter or other writ showing the tenendas and reddendo of the lands in which the ancestor died vest, and shall pay or tender to the superior such duties and casualties as he may be entitled to demand; and where the lands are held of the Crown or Prince, or where the heir is required by the superior, he shall also produce a decree of general or of special service, establishing his right to succeed to the lands; and where the lands are held of the Crown or Prince, the application for the writ of *clare constat* shall be made in the same manner as when a precept from Chancery is applied for, and such writ shall be recorded in Chancery, as precepts are in use to be recorded.

(4.) All precepts from Chancery, and precepts and writs of *clare constat*, shall operate as a confirmation of the whole deeds and instruments necessary to be confirmed in order to complete the investiture of the parties obtaining such precepts or writs.¹ [Consolidation Act, §§ 84 and 101, Schedules U. No. 1, and W. No. 1.]

1067. How long were precepts of *clare constat* and Chancery precepts available as warrants for sasine as the law stood formerly; and what is now the rule?

(1.) Before the Lands Transference Act, precepts of *clare constat* fell by the death either of the granter or grantee; but by that statute such precepts are declared to be effectual notwithstanding the death of the granter, as a warrant for giving infetment to the grantee at any time during the grantee's life.² [Consolidation Act, § 103.]

(2.) Before the Titles Act, Chancery precepts not only fell by the grantee's death, but were void unless followed by a recorded sasine before the next team of Whitsunday or Martinmas.³ It appears to be doubtful whether such precepts, although comprehended under the term "conveyance" by the interpretation clause of the Titles Act, may, under § 19, be validly recorded in the

¹ 21 & 22 Vict. c. 76, § 11.

² 8 & 9 Vict. c. 35, § 6.

³ 10 & 11 Vict. c. 48, § 15.

Register of Sasines at any time during the life of the grantee, as the effect of registration of a conveyance is the same "in all respects as if the conveyance so recorded had been followed by an instrument of sasine, duly expedite and recorded *at the date of recording the said conveyance, according to the present law and practice*;" while a sasine on a Chancery precept recorded after the next term, would be null. The expression "*duly expedite and recorded*," on the other hand, might be held to warrant the construction that registration of the precept at any time during the grantee's life, is equivalent to infestment validly expedite.¹(d). [The Consolidation Act, § 86, provides that Crown writs of *clare constat* or precepts shall be null and void, unless recorded with warrants of registration on behalf of the heirs in whose favour they are granted, before the first term of Whitsunday or Martinmas after the date of the writ or precept.]

1088. Compare special services and precepts of *clare constat*,
(1) as regards the description of the heir's character;
and (2) as regards their effect in excluding challenge.

(1.) Service being an *actus legitimus*, the character in which the heir by that form takes up the right, must be minutely and accurately described. [See Answer 1087.] On the other hand, a precept of *clare constat* does not require to set forth the precise character in which the heir claims an entry, it being sufficient that the instrument be substantially correct, and that the character which he truly bears be not altogether inconsistent with that set forth in the instrument.²(e).

(2.) A service prescribes in twenty years, by the Act 1617, c.

¹ 21 & 22 Vict. c. 76, §§ 1, 19, 36. Ross L.C. 287; Duff's Feud. Conv.

² Durham's Trs., M. 15118; 2 486.

(d) There seems to be no good ground for the doubt here expressed as to the time for recording Chancery precepts. The Act (§ 19) expressly declares that "*all conveyances*," &c., "*hereby authorised to be recorded in the Register of Sasines may be recorded at any time in the life of the party on whose behalf the same shall be presented for registration.*" The words "*according to the present law and practice*," which occur in § 1, do not seem to apply to the date of recording.

(e) In correct practice, however, the character should be accurately set forth.

13, and is afterwards unchallengeable even by the true heir ;(*f*) but a precept of *clare constat*, not proceeding on a service, may be challenged at any time within forty years.¹ [The alteration in the period of the positive prescription will be remembered.]

1069. What is the effect of a precept of *clare constat* to the heir in liferent, and his son in fee ?

The precept is null as to the son ; on the principle, that the superior, without being reinstated by resignation, can grant a renewal of the investiture in favour of the heir, only in the terms in which it stood in the person of the former vassal.²

1070. A proprietor of burgage subjects dies infert in part, having possessed the rest upon a personal title ; How will his heir's title be completed ?

(1.) To the subjects in which the ancestor was infert the heir's title is completed by instrument of cognition and sasine under the hands of the town-clerk as notary, recorded in the Burgh Register of Sasines. Entry by cognition and sasine, which proceeds without the intervention of an inquest, is given by one of the bailies of the burgh, who, as set forth in the instrument, simply cognosces and declares the party to be heir to the ancestor last infert, and accordingly infefts him either by hasp and staple and delivery of earth and stone on the ground of the subjects, or by delivery of a pen in the council-chamber of the burgh.³ Entry by precept of *clare constat* by the bailies does not appear to be incompetent,⁴ but the form is unknown in practice.(*g*.) [Consolidation Act, § 102.]

¹ Menzies Lect. 762 (805).

zies Lect. 790 (838) ; Jur. St. 4th

² Finlay, M. 14480 ; 2 Ross L.C. Edit. i. 562.

265.

⁴ Lockhart, July, 1662, 1 Br. Sup.

³ Duff's Feud. Conv. 514 ; Men- 482.

(*f*) This prescription is available only to the person served, and on his death the right of the true heir revives ; More's Notes, 270 ; Fullerton, 12th Feb. 1824, 2 S. 698. Minorities are deducted in computing the time.

(*g*) By the Titles to Land Act 1860, the heir of a proprietor of burgage subjects, who was infert therein, may make up his title as follows, viz. :—

1. By writ of *clare constat* from the magistrates of the burgh in the form of Schedule D.
2. By decree of special service by the Sheriff of Chancery, or by the sheriff of the county within which the burgh is situate, in the same manner as if the subjects were not held burgage.

(2.) To the subjects which the ancestor possessed on a personal title, the heir's title is completed by general service, to take up the unexecuted procuratory of resignation, and by instrument of resignation and sasine.¹(h) [There is, since the Conveyancing Act, no distinction as to forms of writs between burgage and feudal subjects.]

[1071. State shortly the provisions of the Conveyancing Act, 1874, as to the liability of an heir for his ancestor's debts.

(1.) An heir is not to be liable for such debts beyond the value of the estate to which he succeeds.

(2.) If the heir renounces, the ancestor's creditors are to have the same rights against the estate as they would have had upon a renunciation before the Act.

(3.) If the heir has intromitted with the estate before renunciation, he is liable to the extent of such intromission only, § 12.]

1072. A party died feudally vested in some lands, and having a personal right to others; How could his heir, before the Conveyancing Act, enter so as to limit his responsibility to the value of the succession?

(1.) The heir might enter by special service,² or precept of *clare*

¹ Crs. of Cumming, M. 14446.

² 10 & 11 Vict. c. 47, § 23.

And such writ of *clare constat* or decree of special service may be recorded in the appropriate Register of Sasines, and when so recorded, with warrant of registration thereon, has the same effect in all respects as if cognition and entry of such heir had taken place in due form, and an instrument of cognition and sasine in his favour had been duly expedite and recorded; § 7.

(h) The heir having thus acquired right to the unexecuted procuratory, may either—

1. Expedite a notarial instrument in the form of Schedule G, setting forth the conveyance and service, and record the conveyance, with warrant of registration thereon, and the notarial instrument, in the appropriate Register of Sasines; or
2. Where it is not desired to record the whole of the conveyance, the heir may expedite a notarial instrument in the form of Schedule B, and record such notarial instrument in the appropriate Register of Sasines; Titles to Land Act 1860, § 10.

constat,¹ to the lands in which his ancestor was feudally vested, either of which forms inferred only a limited passive representation to the extent of the value of the property.

(2.) The heir might limit his responsibility to the value of the lands to which his ancestor had a personal right by general service, with a specification annexed, containing a particular description of the lands.²

(3.) The form formerly in use for the purpose of limiting the heir's responsibility was *service cum beneficio inventarii*, i.e., with reference to an inventory of the amount and value of the lands lodged with the Sheriff-clerk of the county.³ But this procedure had been practically superseded by the provisions of the Service of Heirs Act.

1073. How does an heir make up a public title, his ancestor having died publicly infeft in lands held of the Crown?

(1) By special or general service; (2) precept from Chancery, or writ of *clare constat*; and (3) infeftment on precept or registration of precept or writ; or

(1) By special service; (2) infeftment on or registration of decree; and (3) Crown charter or writ of confirmation. [Confirmation is now unnecessary and incompetent.]

1074. How does an heir make up a public title, his ancestor having died publicly infeft in lands held of a subject-superior?

(1) By precept or writ of *clare constat*; and (2) infeftment on precept, or registration of precept or writ; or

(1) By special service; (2) infeftment on or registration of decree; and (3) charter or writ of confirmation. [See addition to previous Answer.]

1075. How did an heir, before the Crown Charters Act came into effect, make up a public title to lands held of the Crown, his ancestor having died base infeft?

(1) By general service to take up the unexecuted procuratory of resignation in the disposition on which his ancestor was infeft;

¹ Farmer, M. 14003; Gordon, M. 11166; Rosebery, 5 B. Sup. 926.

² 10 & 11 Vict. c. 47, § 25.

³ Bell's Prin. 1926.

(2) Crown charter of resignation; (3) infeftment on charter; (4) precept of *clare constat* by the heir in favour of himself, as heir to his ancestor in the *dominium utile*; (5) infeftment on precept; and (6) consolidation by resignation *ad remanentiam*.¹

1076. How does the heir now make up his title?

In the same way as if the ancestor had been publicly infeft (see Ans. 1073); the precept from Chancery or writ of *clare constat* in the one case, or the charter or writ of confirmation in the other, operating as a confirmation of the whole writs necessary to be confirmed in order to complete the investiture. [Confirmation is now incompetent. The ancestor will now have been entered by the implied entry under the Conveyancing Act, § 4, sub-sec. 2.]

1077. B served as heir in general to his father, A, whose title was an unrecorded conveyance; How does B's heir, C, complete a public title to the lands?

The personal right under the unrecorded conveyance having been vested in B by his general service to A, C will take it up by general service to B, and complete his title either by infeftment or notarial instrument(i) and confirmation, or by resignation and infeftment or registration. [See additions to foregoing Answers]

1078. B served as heir in special to A, his father, whose title was complete, and died without taking infeftment on or recording the decree of service; How does B's heir, C, complete a public title to the lands?

[B's special service having now (Consolidation Act, § 46) the effect of a disposition by A to B, C will serve as heir in general to B, and then expedite and record a notarial instrument in ordinary form upon the two services. This Answer is altered from that in the last edition.]

1079. A died infeft on a disposition *a me*, but unconfirmed; How does B, his heir, make up a title?

(1) B will expedite general service to A, which will carry the

¹ Duff's Feud. Conv. 241.

(i) And recording.

disposition in his favour as a personal right ; (2) B may then enter with the superior in virtue of the unexecuted warrants contained in the disposition, either by infeftment or notarial instrument and confirmation ;(k) or resignation, and infeftment or registration ;(l) or

(1) B may serve as heir in special to A, take infeftment on or record the decree, and obtain a charter or writ of confirmation ; or (2) he may obtain a precept or writ of *clare constat* ; either of which operates as a confirmation of A's infeftment), and take infeftment on the precept, or record the precept or writ.¹ [A will now have had the benefit of implied entry (see addition to Answer 1076) and B's title will be completed by serving heir to him in special, and recording the decree.]

1080. A disposed *de me* to B, who was infeft, B disposed *a me vel de me* to C, who was infeft ; C having died without obtaining confirmation of his infeftment ; How would his heir D have made up his title before the Titles Act came into effect, and what would be the procedure under that statute ?

1. Before the Titles Act,—

(1) By obtaining from A a charter of confirmation of C's infeftment, combined with a precept of *clare constat* ; and (2) infeftment on the combined charter and precept ; or

¹ Douglas, M. 3008 ; Ersk. 3, 8, 63 ; Ivory's Note, 493 ; Menzies Lect. 755 (798).

(k) Infeftment and confirmation would in this case be incompetent, the precept having been exhausted by the sasine in favour of A. See *supra*, note (h), p. 347.

(l) A question might be raised under this form of completing the title, because by the Titles to Land Act, 1858, § 9, a writ of resignation is declared to operate as a confirmation of all prior deeds and instruments, and if this were held to include A's sasine it would create a mid-impediment. Under the old system, this would have been avoided by omitting A's sasine from the confirming clause, which, in the case supposed, must, even under the 10 & 11 Vict. c. 48, have enumerated all the deeds requiring confirmation. See *supra*, note (g), p. 331. It seems pretty clear, however, that the qualifying words, "necessary to be confirmed in order to complete the investiture of the party obtaining the writ," would exclude A's sasine from the confirmation, or the deeds intended to be confirmed might be enumerated.

(1) By special service ; (2) infeftment on decree : and (3) charter of confirmation by A.

2. Under the Titles Act,—

(1) By obtaining from A a writ of *clare constat*, and (2) registration of writ ; or

(1) By special service ; (2) registration of decree ; and (3) writ of confirmation by A. [See addition to Answer 1073.]

1081. A, infeft, dispones *de me* to his son and heir, B, who takes infeftment ; How does B make up a title on A's death ?

He makes up a title to the mid-superiority by either of the methods specified in Ans. 1074. Having completed his title to the mid-superiority, he will consolidate the two fees by granting in favour of himself, and recording in the Register of Sasines a procuratory of resignation *ad remanentiam* [or, he can now, after being infeft in both fees, consolidate them by signing and recording a minute in the form provided by the Conveyancing Act, Schedule C].

1082. A dispones *de me* to B, who takes infeftment ; A succeeds as heir to B ; How does he make up his title ?

By precept or writ of *clare constat* by A in favour of himself, and infeftment on precept, or registration of precept or writ, and consolidation.

1083. A disponed lands *de me* to B, who took infeftment : and he afterwards disponed the superiority of the lands *a me* to B, who completed a public title to it by resignation and infeftment ; but he died without consolidating the two fees ; How is his heir, C, to make up his title ?

(1) C will serve as heir in special to B, in the superiority, and take infeftment on or record the decree ; (2) he will then grant, in his own favour, a writ of *clare constat*, as heir in the *dominium utile*, and record it in the Register of Sasines ; and (3) consolidate by resignation *ad remanentiam* [or minute, see Ans 1081].

1084. A, whose title was complete, disponed lands *de me* to B, who took infeftment and afterwards re-disponed to

A by disposition, containing a procuratory of resignation *ad remanentiam*; A died without having completed the reconveyance; How does his heir, C, make up a title?

(1) By special service, as heir to A in the superiority, and registration and confirmation, or by writ of *clare constat* and registration; and (2) general service as heir to A in the property, and notarial instrument [Consolidation Act, Schedule J], which will consolidate the two fees. The special and the general service may be combined in one decree.

1085. A, publicly infeft, disponed to B, by disposition containing *a me vel de me* holding. B took infeftment, but died without entering with the superior; his heir, C, obtained, and was infeft, on a precept of *clare constat*, which did not contain a confirmation. On C's death, How is his heir, D, to make up his title?

(1.) If the precept of *clare constat* to C was granted before the Titles Act came into effect, C's title was null; in respect that the precept in his favour did not contain a confirmation of B's infeftment. D will therefore pass over C, as if he had possessed on apparency, and enter by special service, or precept or writ of *clare constat*, as heir of B.

(2.) If the precept of *clare constat* in favour of C was granted after the Titles Act came into operation, it had the effect of a confirmation, and D will therefore enter as heir to C, either by special service, or precept or writ of *clare constat*.

1086. A, infeft, disponed to B, with procuratory and precept; B entered with the superior by resignation and infeftment. On his death, his heir, C, discovered an error in B's infeftment, the effect of which was doubtful; How should he make up his title?

(1) Expede service as heir in general to B; (2) obtain a new charter of resignation from the superior, proceeding on the procuratory in the disposition by A, the charter having combined with it a precept of *clare constat*; and (3) take infeftment on the combined charter and precept. In this way, C would have an alternative title resting (1) on the precept of *clare constat* and infeft-

ment, if the infeftment on B's charter was valid ; or (2) on the charter of resignation and infeftment, if B's infeftment was inept.¹ An alternative title might likewise be completed as follows:—(1) By general and special service of C to B, which may be comprehended in one decree ; (2) infeftment on or registration of the decree ; (3) charter of confirmation confirming the infeftment or registered decree, combined with a resignation in virtue of the procuratory in A's disposition, transmitted by the general service, and (4) infeftment on the charter.^(o) [The third alternative method mentioned in note (o) gives the manner in which the title should now be made up.]

[1087. What are the provisions of the Conveyancing Act as to error in the character in which an heir has been entered ?

It is to be no objection to a precept or writ from Chancery, or of *clare constat*, or decree of general or special service, or writ of acknowledgment, whether obtained before or after the Act, that the character in which the heir was entitled to succeed was erroneously stated therein, provided such heir was truly entitled to succeed to the lands ; § 11.]

¹ Duff's Feud. Conv. 488.

(n) The *principle* of what is here proposed, which is just making up double titles, is correct ; but whether such a deed as a charter of resignation, combined with a precept of *clare constat*, was ever known in practice may be doubted. It would be very anomalous, because, besides proceeding on the assumption (1) that A was resigning, and (2) that B died last vest and seized in the lands, it would require to contain two precepts, one appropriate to the resignation, and the other to the precept of *clare constat*. The better way would be to make up the two titles separately.

(o) Here also what is proposed is correct in principle, but the proposed deed by the superior would involve the anomaly of assuming (in its confirming clause) that the subjects had been vested in B, and (in its disposing clause) that they were resigned by A. If a double title were to be made up, it should be done separately. In this view a third course might be followed—(1) C, by general service to B, might take up the (supposed) open charter in his favour, and complete a title thereon by infeftment or notarial instrument and registration, which would (on the supposition) be perfect ; and (2) he might procure and record, with warrant, a precept or writ of *clare constat* from the superior, which, if B's infeftment was good, would form a valid title.

IX. ENTRY WITH THE SUPERIOR.

[1088. What are the provisions of the Conveyancing Act as to implied entry with the superior ?

Every proprietor duly infeft at the commencement of the Act, or thereafter, is to be held to be, at the date of registration of his infeftment, duly entered with the nearest superior, to the same effect as if the superior had granted a writ of confirmation, and that whether the superior's or any over-superior's title is complete or not. Such implied entry is not to confer or confirm more extensive rights than those contained in the original feu-right or the last charter of the feu. It is provided that the Act shall not validate any sub-feu where subinfeudation has been effectually prohibited ; and that the proprietor last entered, and his heirs and representatives shall remain personally liable to the superior for the feu-duties and obligations of the feu, until notice of change of ownership is given to the superior in the form annexed to the Act (Schedule A). The superior is, nevertheless, to have all his remedies against the proprietor entered by the implied entry. The last-entered proprietor is also to be entitled to recourse against the entered proprietor for all feu-duties paid by the former in consequence of failure to give the statutory notice, and in order to effectuate that recourse, the Act (subject to a saving clause) assigns to him the superior's remedies ; § 4, sub-sec. 2. See Rankin 7 R. (H. of L.) 10, and cases there cited.

The implied entry is not to affect the superior's right to casualties, feu-duties, or arrears of feu-duties due at or prior to the date of the implied entry. His remedies by law or under the feu-right for recovering, securing, and making effectual casualties, feu-duties, and arrears, or for irritating the feu *ob non solutum canonem*, and the conditions of feu prestable by the superior, so far as not affected by the Act, are to continue available. The implied entry is not, however, to antedate the time when the superior can call on the proprietor to pay a casualty ; § 4, sub-sec. 3. See Morris, 4 R. 515.

After the commencement of the Act, no lands are to be in non-entry. A superior who would but for the Act have been entitled to sue a declarator of non-entry, may, whether infeft

or not, sue an action of declarator and for payment of a casualty. A form of summons is provided (Schedule B), § 4, sub-sec. 4.]

[The following questions have necessarily been varied somewhat.]

1089. Has a liferenter of a superiority the power of granting writs by progress?

(1) A liferenter by constitution cannot grant a valid [writ]: because the superior must be infeft in the fee.¹ (2) A liferenter by reservation has power, in virtue of his original infeftment in the fee, to [grant writs.²] (3) Where special power to grant entries [or writs] is conferred on a liferenter by constitution [writs] by him are valid.³

1090. A was infeft and entered; after A's death, B, his heir, was infeft on a precept of *clare constat* by a liferenter by constitution of the superiority, whose title as such appeared *ex facie* of the records; B executed a trust-disposition and settlement to trustees, excluding his heir-at-law; after B's death, his trustees recorded the trust-disposition and settlement in the Register of Sasines, and his heir, C, served as heir in special to A, and recorded the decree of service; Who was vested with the property?

The property was vested in C. The precept of *clare constat* in favour of B was inept, being granted by a liferenter by constitution, and the title made up by his trustees consequently was invalid.⁴

1091. A was infeft on a conveyance of the superiority in 1840; B, the heir of the last entered vassal in the property, entered with A by precept of *clare constat* and infeftment, in 1845; C established a preferable title to the superiority, and reduced A's infeftment, in 1850; B executed a trust-conveyance excluding his heir-at-law. On his death, in 1855, B's trustees

¹ Henderson, 19th Feb. 1836, 14 S. 540.

² Bell's Prin. 1055.

³ Gibson-Craig, 10th July, 1838, 16

S. 1332; aff. 23rd Sept. 1841; 2 Rob. App. 446.

⁴ Henderson, *supra*.

took infeftment on the trust-conveyance; and his son, D, entered with C by charter of *novodamus* and precept of *clare constat*, and infeftment, as heir to the immediate ancestor of B; Who has the preferable title to the property?

The trustees of B, it is thought, have the preferable title; the reason being, that as A appeared *ex facie* of the records to be superior at the date of B's entry with him, the entry was valid, although A's title to the superiority was subsequently reduced.¹(p)

1092. What is the composition payable by a singular successor, (1) where he is proprietor of the lands; (2) where the lands have been sub-feued at their fair value at the time, and the sub-vassals have erected houses which yield a large amount of rents; and (3) where the lands have been sub-feued at an undervalue in consideration of a grassum?

(1.) Where the singular successor is proprietor of the lands, the composition is a year's rent of the subjects, as they may be set at the date of the entry, under deduction, 1st, of the feu-duty and annual burdens imposed with the superior's consent; 2nd, of a reasonable allowance for annual repairs; 3rd, of public burdens; and 4th, one-fifth for teind, whether the teinds have been valued or not, if the superior is not proprietor of them.² [See as to composition on mineral rents, Sturrock, 7 R. 799, and cases there cited.]

(2.) Where the lands have been sub-feued at their fair value at the time, the composition is a year's sub-feu-duty, and not a year's rent.³ It is still an open question whether the superior is

¹ Gibson-Craig, *supra*; Innes, 20th Nov. 1844, 7 D. 141; Menzies Lect. 769 (813).

² Aitchison, M. 15060; 2 Ross L.C. 183.(r)

³ Cockburn Ross, 6th June, 1815, F.C.; aff. 24th July, 1820, 2 Bligh's App. 707.

(p) This answer is believed to be correct; but it will be observed that in Gibson-Craig, cited, the entry was given by the party who was the real superior, though there was an error in his title; and in Innes, cited, the vassal seems to have previously recognised as superior the party to whose title he was objecting.

(r) See also Anderson, 30th Nov. 1824, 3 S. 334.

entitled to demand the casualties derived by the vassal, during the year of his own entry, from entries to sub-vassals.¹

(3.) Where the lands have been sub-feued for an inadequate feu-duty, in consideration of a grassum, the composition is a year's sub-feu-duty, with a year's legal interest of the grassum.²

1093. A party purchased a long lease of lands at a rent below the annual value ; and he afterwards purchased the lands themselves ; Whether is the composition payable by him, the rent under the lease or the actual value of the lands at the time ?

The composition payable is the actual value of the lands at the time, and not merely the rent under the lease ; because the tenant having acquired the full right of the property in the lands, the principle of *confusio* operates at least a complete temporary suspension of the obligation for rent, and of the whole obligations *hinc inde* under the contract of lease.³

1094. A, under a reservation of his liferent, conveyed an estate to his heir, B, and another estate to trustees for behoof of B, and both conveyances were recorded in the Register of Sasines. On A's death, whether do B and the trustees pay relief or composition ?

B pays relief merely ;⁴ but the trustees, although holding for behoof of the heir, must pay composition.⁵

1095. How may a disponent, infert on a disposition *a me vel de me*, avoid payment of a composition on the death of the disponent ?

By getting the heir of the disponent (though he cannot be compelled) to complete a title to the mid-superiority created by the infertment of the disponent. The heir is entitled to an entry on payment of relief, and, the fee thus being full, the superior is

¹ Campbell, 28th June, 1832, 10 S. 734.

² Campbell, *supra*.

³ Lord Blantyre, 1st July, 1858, 20 D. 1188.

⁴ *Per* Lord Covington in Mackenzie, M. App. "Superior and Vassal," No. 2 ; 2 Ross L.C. 404.

⁵ Grindlay, 18th Jan. 1810, F.C.

precluded from demanding composition during the heir's life.¹(s) [Testamentary trustees took infeftment in March, 1874, by recording a notarial instrument on an *a me vel de me* disposition, their author being the vassal last infeft. Held (1) that by the operation of the 4th section of the Conveyancing Act, 1874, the trustees were entered with the superior, and that therefore the heir of the last entered vassal could not be tendered for an entry; and (2) that the trustees, by their implied entry, were liable in a composition of a year's rent. Rankin, 7 R. (H. of L.) 10; see also the other cases there referred to.]

1096. A, infeft and entered, disponed to B, who infefted, and disponed to C, who infefted, and disponed to D, who likewise took infeftment, and applied to the superior, after the death of A, B, and C, for a writ of confirmation; What did he pay for an entry?

He paid only a single composition; and was not bound to pay up the compositions which might have been exigible from his authors.²

1097. A, having purchased an estate, executed an entail in favour of himself, whom failing, to B, a stranger in blood, and a series of substitutes. A completed titles under the entail by infeftment and confirmation, having paid the superior a composition of a year's rent for an entry; On what terms was B, after A's death, entitled to an entry under the entail?

B, although a stranger in blood to A, was entitled to an entry under the entail as heir of the investiture, on payment of relief merely; the principle being, that "where the superior has already received, upon the change of investiture, the composition of a

¹ Pigott, 9th Dec. 1829, 8 S. 213; ² Bell's Com. (Shaw's edit.) ii. Bell's Prin. 723; Jur. St. 4th edit. 741. i. 382; Menzies Lect. 770 (814).

(s) A part of lands having been conveyed, burdened with the feu-duty and casualties payable for the whole; held that "casualties" included compositions payable on the entry of singular successors, and that the proprietor of the part was bound to pay them, as well as the feu-duty of the whole lands; Edinburgh Gas Light Co., 5th July, 1843, 5 D. 1325.

year's rent at the entry of the first member of entail, not being heir of the previous investiture, he is bound throughout to deal with the entail as the existing investiture of the estate; and to carry out and give effect to the destination therein contained, as the rule of that investiture in regard to succession, and, consequently, to receive the whole series of substitute heirs, without distinction of one from another, as the line of succession thus fixed respectively opens to each in the express character, and is entitled to all the privileges and rights of heirs of the investiture."¹(*t*)

1098. A executed an entail in favour of the heirs of his body, whom failing to B, a stranger in blood, and a series of substitutes; On what terms was A's heir entitled to an entry under the entail?

A's heir was entitled as heir of the former investiture, on payment of relief merely, to a charter containing the whole destination under the entail; but the superior was entitled to insert a reservation of his right to claim a year's rent upon the entry of the first substitute under the new investiture who should not be the then existing heir under the former investiture.²

1099. A feu-charter was granted to A, and his heirs and assignees; A, without feudalising the charter, assigned it to B, a stranger, who recorded it in the Register of Sasines; On what terms was B's heir entitled to an entry?

B's heir was entitled to an entry on payment of relief only; the

¹ Stirling, 14th Feb. 1842, 4 D. 684; Opinion of Lord Ivory, aff. 4th Sept. 1844, 3 Bell's App. 128.

² Mackenzie, 4th July, 1777, M. App. "Superior and vassal," No. 2; M. of Hastings, 27th May, 1859, 21 D. 871.

(*t*) In the same way, where A, who stood base infest as purchaser from a Crown vassal, conveyed the property to trustees, to be entailed on B and a series of heirs, and B, who was the heir-at-law, entered, paying a year's rent, and conveyed to the trustees, who thereupon executed an entail in favour of B, &c.; held that B, on making up a title as institute, and entering, was not liable in a second composition; Adv.-General, 30th Jan. 1854, 17 D. 21.

grantee of a feu-charter being entitled to possess without taking infektment, and to assign the personal right.¹(*u*)

1100. Was an heir entering by resignation in virtue of his ancestor's procuratory, or a singular successor, entitled to demand from a superior an assignable charter?

An heir paying relief was not entitled to an assignable charter;² but a singular successor, or an heir, on payment of composition, was entitled to demand a charter assignable, before infektment, to any person he pleased.³(*x*)

1101. A, a singular successor, on payment of composition, having obtained from the superior a charter of resignation, assigned it to a stranger, B, and the heirs of his body. B took infektment on the charter, and died; On what terms was his heir entitled to an entry?

B's heir was entitled to an entry on payment of relief.⁴

[1102. What are the provisions of the Conveyancing Act, 1874, as to casualties payable by a corporation and by trustees, unless otherwise stipulated?

(1.) Corporations are to pay a singular successor's casualty at the date at which such casualty would have been paid if the Act had not been passed, and every twenty-fifth year thereafter.

(2.) Trustees are to pay a similar composition on the death of the person last entered, and every twenty-fifth year thereafter so long as the feu is vested in them.

(3.) Where a taxed composition is exigible on sale or transfer, as well as on death, and a composition shall on acquisition become payable by a corporation or by trustees, another composition, if not otherwise stipulated, shall be payable every fifteen years after

¹ Stewart, M. 15027; 2 Ross L.C. 161.

³ D. of Hamilton, 8th March, 1839, 1 D. 689; 2 Ross L.C. 391.

² Magistrates of Musselburgh, M. 15038; 2 Ross L.C. 166.

⁴ D. of Hamilton, *supra*.

(*u*) Unless assignation is prohibited by the charter.

(*x*) But it may be, and very often is, a condition of the original feu-right that the superior shall not be bound to grant assignable charters, in which case they cannot be demanded.

such acquisition, so long as the feu is possessed by the corporation or trustees, with interest if any such is stipulated.

(4.) If a corporation or trustees cease to hold the feu, after having paid a composition in terms of the above enactments, the successor infeft in the feu shall, in the cases dealt with in paragraphs (1) and (2), pay a composition at the end of twenty-five years from the last such payment; and in the cases dealt with in paragraph (3), shall pay a composition at the end of fifteen years from the last such payment; and the casualties shall thereafter fall due in the same way as if the feu had not been possessed by the corporation or trustees, § 5.]

1103. A reservation of mines and minerals in the superior's favour, not contained in the original charter, was inserted in successive charters by progress taken by the vassals for a period extending back for sixty years; but there was no act of possession of the minerals on the part of the superior; Has the superior right to the minerals?

No; because the reservation was not contained in the original charter; agreeably to which charters by progress are regulated and interpreted.¹(b)

1104. A, who held an unrecorded conveyance in favour of himself and his heirs, which did not contain a procuratory of resignation, obtained from the superior a charter of confirmation and *novodamus*, in favour of himself in liferent, and B, his son, in fee, on which infeftment followed. The creditors of B having proceeded to attach the fee by adjudication, A took infeftment on the conveyance; Were B's creditors excluded?

¹ Graham, 27th Jan. 1842, 4 D. 482.

(b) See also Threipland and Others (M'Donald's Trs.), 30th May, 1845, 10 D. 1062 and 1079; Smith, 8th June, 1860, 22 D. 1158. But where the vassal has allowed the reservation to be inserted in his titles, he may not be entitled to challenge it; Bain, 19th May, 1865, 3 M'P. 821.

On the other hand, where the exception or reservation was in the original feu-right, the omission of it for upwards of seventy years in charters by progress is not a competent mode of conveying the minerals to the vassal, and the superior is entitled, in giving a new entry, to insert a reservation in terms of the original right; Hutton, 11th Nov. 1863, 2 M'P. 79.

Yes ; because the superior not having been reinvested by resignation, the charter of confirmation and *novodamus* granted by him was null, and could confer no right on B.¹(c)

1105. What was the method in use before the Lands Transference Act, of enforcing an entry where the superior's title was complete ; and where it was incomplete ?

(1.) Where the superior's title was complete,—the vassal, on production of a retour or a procuratory of resignation, was entitled to obtain letters of horning, to charge the superior to enter him on an *induciae* of fifteen days ; and after expiration of the charge, and on tendering the duties and casualties, the vassal might either proceed against the superior by caption, or resort for an entry to the successive over-superiors, charging them in their order, until he reached the Crown, who refuses no vassal.

(2.) Where the superior's title was incomplete,—the vassal was entitled to charge the superior, under the Act 1474, c. 57, to enter with his superior within forty days ; under certification that, if he fail, he should “tyne his superiority” during the vassal's lifetime.(d) On expiration of the charge, the vassal applied to the next over-superior for an entry ; but before obtaining a charter, it was necessary to procure decree of declarator of tinsel of superiority against the recusant superior.²

[The statutory provisions to which the following five questions relate were substantially re-enacted by the Consolidation Act, §§ 104 to 112, and relative schedules, but may now be held as practically superseded by the provisions of the Conveyancing Act, 1874.]

1106. What is the method introduced by the Lands Transference Act, of enforcing an entry where the superior's title is complete ; and where it is not complete ?

¹ Grieve, M. 3022 ; 2 Ross L.C. 152.(c)

² Ersk. 2, 7, 7 ; 3, 8, 80 ; Bell's Prin. 735, 792 ; Menzies Lect. 775 (820).

(c) In Grieve, here referred to, the judgment did not proceed on the want of a procuratory ; the disposition contained one.

(d) The words of the Act are, “tyne the tennent for his lifetime, and assith the partie of his coastes and akaithes that sall be susteined throw him in default of his entrie.” The superior did not forfeit the fixed yearly duties ; Ersk. 3, 8, 80.

(1.) Where the superior's title is complete—

A party infeft upon a conveyance, containing an obligation to infeft *a me vel de me* by the last entered vassal, or by one whose own title is capable of being made public by confirmation; or upon a decree of special service; or upon a decree of adjudication or of sale, is entitled, on production in the Bill Chamber of his sasine, along with its warrant, to obtain letters of horning to charge the superior to grant an entry by confirmation, in the same way as the like diligence is used for compelling entry by resignation; the charger being bound to pay or tender to the superior the duties and casualties to which he is entitled; and it being lawful to the superior to show cause, in a suspension of the charge, why he ought not to be compelled to grant an entry.¹

(2.) Where the superior's title is incomplete—

1. Where the annual reddendo attached to the superiority does not exceed five pounds sterling in value or amount, the vassal(*e*) presents (*f*) an application to the Lord Ordinary on the Bills, for an order on the superior within thirty days (or sixty if he is in Orkney or Shetland or furth of Scotland), to procure himself entered and infeft, and enter the vassal on payment of the duties and casualties, or to show cause for delaying or refusing to do so; with certification, that if he fail he shall forfeit all right to the superiority. If the order is not complied with, (*g*) the petitioner is entitled, after the expiration of the days of intimation, to obtain a deliverance on the petition, finding and declaring that the respondent has forfeited all right to the superiority, and that the petitioner and his heirs are entitled to hold the land in all time coming of the next over-superior, by the same tenure, and for the same reddendo, as under the forfeited superiority. The decree, when extracted and recorded in the appropriate Register of Sasines, absolutely extinguishes the right of superiority, and enables the petitioner to apply to the next over-superior, as his immediate superior, for a charter with the same tenendas and

¹ 10 & 11 Vict. c. 48, § 6.

(*e*) More properly the heir or disponent of, or adjudger from, the last vassal, &c.

(*f*) The party may in his option adopt the course of procedure; *infra*, 2.

(*g*) Or reasonable cause shown for the delay or refusal to comply with the order.

reddendo as are contained in the titles of the forfeited superiority.¹ This procedure extinguishes the mid-superiority to the same effect as if it had been conveyed to the petitioner and consolidated with the property by resignation *ad remanentiam*.²

2. Where the annual reddendo exceeds five pounds, the procedure is similar, but the certification in the order is, that the superior shall forfeit, not the superiority itself, but the duties and casualties payable on the entry of the petitioner, and that he shall be entitled to retain the feu-duties until fully paid and indemnified for all the expenses of the petition, and procedure thereon, and of completing his title in terms of the Act. After expiration of the *induciæ*, (i) judgment is pronounced to the above effect, and granting warrant to the petitioner for obtaining an entry with the Crown, or, in his option, with the mediate over-superior, as acting in the vice of the recusant superior; and also granting warrant for letters of horning to charge the mediate over-superior to give the petitioner such an entry. But the lands contained in the charter to be so obtained are to be held of the Crown, or the mediate over-superior, as in the vice of the unentered immediate superior, only so long as he and his successors shall remain unentered, and thereafter until a new entry in favour of the vassal or his successors shall become requisite. The procedure above detailed is available to the vassal, although the annual reddendo should be under five pounds.³(l)

1107. What is the mode of relinquishing superiorities introduced by the Titles to Land Act?

¹ 10 & 11 Vict. c. 48, § 8.(h)

² 10 & 11 Vict. c. 48, §§ 9, 10.(k)

³ *Ibid.* § 12.

(h) And Schedule E, Nos. 1, 2, and 3.

(i) Unless reasonable cause for the delay or refusal be shown.

(k) And Schedule F.

(l) Where a petition is presented against a superior, not having completed his feudal title, he may in every case, before the interim decree is pronounced, lodge a minute relinquishing the right of superiority; and if such minute be lodged, and the petitioner sign an acceptance thereof the Lord Ordinary interposes his authority thereto, and declares the right of superiority to be extinguished to the effect of making the petitioner hold the lands immediately of and under the superior of the relinquished superiority in permanency, which entitles the petitioner to apply to him for an entry, but the petitioner is not bound to accept of the relinquishment; 10 & 11 Vict. c. 48, § 11, and Schedule G. The form of charter is contained in Schedule I.

(1.) The superior, whether entered or not, grants, in favour of the vassal, a deed of Relinquishment, Schedule N, No. 1, absolutely relinquishing and renouncing his right of superiority of the lands in favour of the vassal, and declaring that they shall no longer be held of the granter as superior, but shall be held of his immediate lawful superior in all time to come.

(2.) The deed of relinquishment is accepted by the vassal by an acceptance written on the deed, in terms of Schedule N, No. 2.

(3.) A writ of investiture, written on the deed of relinquishment, is granted by the over-superior, in the form of Schedule N, No. 3, by which he accepts and receives the vassal, and his heirs and successors, in place of the granter of the deed of relinquishment and his heirs and successors in virtue of the deed of relinquishment and acceptance thereof, to be holden by the grantee by the tenendas, and for the reddendo contained in the titles of the relinquished superiority.

(4.) The deed of relinquishment, with the acceptance and writ of investiture written thereon, is recorded in the appropriate Register of Sasines.¹

1108. What is the effect of such a relinquishment?

(1.) The superiority relinquished is extinguished, the investiture completed upon the relinquishment being as effectual as if the granter of the deed of relinquishment had completed his title to the superiority, and had thereafter conveyed the same to the vassal; and the latter, after having completed his titles under the over-superior, had resigned *ad remanentiam* in his own hands.

(2.) The investiture so completed does not in any respect extend the rights or interest of the over-superior, and he is entitled to no more than the duties and casualties, taxed or untaxed, to which he would have been entitled if the granter of the deed of relinquishment had remained his vassal.

(3.) Such relinquishment by a superior, who shall not have completed his title to the superiority relinquished, does not infer a passive representation on his part, nor any liability for the debts of the person last infeft therein, beyond the price or consideration if any, which he may have received for the relinquishment.²

¹ 21 & 22 Vict. c. 76, §§ 23, 24.

² 21 & 22 Vict. c. 76, §§ 23, 24.

1109. Where the relinquished superiority is part of an entailed estate, how is the price received for the relinquishment to be applied?

The price received for the relinquishment is to be consigned in a chartered bank, subject to the orders of the Court, and is to be applied to such purposes as purchase-money or compensation coming to parties having limited interests, is made applicable under the Lands Clauses Consolidation Act, or the Entail Amendment Act, or the Entail Amendment Extension Act, or any private Act of Parliament authorising the sale of the entailed estate.¹

1110. May the price of relinquished superiorities of entailed lands be charged on the entailed estate?

The price of such relinquished superiorities, with the relative expenses, may be charged on the entailed estate by bond and disposition in security granted by the vassal obtaining the relinquishment (1) with consent of those heirs of entail whose consent would be required to the execution of an instrument of disentail of the lands; or (2) under authority of a judicial warrant or decree of the Court pronounced on a summary petition by the heir of entail in possession, the proceedings under the petition being the same as under a petition to charge the estate with provisions to younger children as authorised by the Lands Clauses Act and the Entail Amendment Act, excepting that in this case newspaper advertisement is unnecessary.²

X. INHIBITION.

1111. What is an inhibition?

Inhibition is a personal prohibition, which proceeds on a writ passing under the Signet, forbidding a debtor from alienating his heritable property, and from contracting debts, by means of which it may be attached, to the prejudice of the creditor using the diligence, and interdicting the public from receiving from the debtor conveyances of such property.³

¹ 21 & 22 Vict. c. 76, § 25.

² *Ibid.* § 26.

³ Ersk. 2, 11, 2; Bell's Prin. 2306.

1112. Upon what grounds may inhibition proceed?

Inhibition may proceed, (1) on a liquid obligation, such as a bond, bill, or decree; or (2) upon an executed summons; ^(m) [a warrant to inhibit may be inserted in the summons, Court of Session Act, 1868, § 18] or (3) upon a debt not yet payable, when the debtor is *vergens ad inopiam*.¹

1113. How does a creditor proceed in using inhibition against his debtor?

(1.) The bond or other warrant is produced in the Bill Chamber, with a bill for letters of inhibition, which is passed as a matter of course; the deliverance being "*fiat ut petitur*, because the Lords have seen the registered bond," or other warrant upon which the diligence is to proceed. [Section 156, and Schedule QQ of the Consolidation Act, 1868, provide a short form of letters of inhibition. See Stevens, 11 M.P. 772.]

(2.) The letters of inhibition are then signeted, the bill being left in the Signet Office, as the warrant of the diligence.

(3.) The inhibition is executed against the debtor personally, or at his dwelling-place.

(4.) It is executed against the lieges by publication at the market-cross of the head burgh of the jurisdiction of the debtor's domicile.

(5.) Within forty days of the date of publication the letters of inhibition, with the executions, are registered either in the General Register of Inhibitions, or in the Particular Register of the counties, both of the debtor's domicile and where the lands lie.² [Particular Registers of Inhibitions were abolished in 1868, by § 16 of the Land Registers Act.]

1114. How is an inhibition executed when the debtor is further of Scotland?

¹ Ersk. 2, 11, 3; Bell's Prin. 2807.

² Ersk. 2, 11, 4; Menzies Lect. 820 (871).

(m) A defender also may use inhibition on a depending action when an interlocutor has been pronounced by the Lord Ordinary or the Court finding him entitled to expenses.

If an action has been more than a year and a day in dependence, it is necessary to exhibit to the Clerk of the Bills an interlocutor pronounced within the year previous, to show that the process is not asleep.

The inhibition is executed against the debtor edictally, at the office of the keeper of Edictal Citations; and against the lieges at the market-cross of Edinburgh, and pier and shore of Leith.¹

1115. A debtor was domiciled, and possessed lands, in the county of Lanark; an inhibition against him was duly executed and published on 1st March, and registered in the Particular Register for the county of Lanark on 1st April. The debtor acquired additional lands in the county of Lanark, and also in the county of Stirling, on 20th March; Did the inhibition attach to these additional lands?

(1) The inhibition being duly executed and published, and timeously registered, attaches to the additional lands acquired by the debtor situated in the county of Lanark, as the diligence affects *acquirenda*,² and when registered within forty days is effectual from the date of publication.³ (2) The lands situated in the county of Stirling are not affected by the inhibition, as it was not registered in the General Register nor in the Particular Register for that county.

[1116. What alteration on the law of inhibitions was made by the Consolidation Act, 1868?

Section 157 provides that an inhibition recorded after 31st December, 1868, is not to affect *acquirenda*, but if an inhibition is used against a person who shall afterwards succeed to lands, which at the date of recording the inhibition were destined to him by entail or similar indefeasible title, then the inhibition is to affect said person so far as regards such lands.]

1117. After an inhibition had been duly executed and recorded, the debtor inhibited granted a discharge of an heritable security held by him, and also disposition in implement of missives of sale entered into anterior to the date of the inhibition; Was the discharge or the disposition affected by the inhibition?

Neither the discharge (*n*) (unless the debtor in the security

¹ Menzies Lect. 820 (871).

³ Ersk. 2, 11, 6.

² Ersk. 2, 11, 10.

(*n*) On this point Professor Bell says (Com. ii. 136)—“It is a settled rule

had received notarial intimation of the inhibition)¹ nor the disposition(o) is effected by the diligence; because inhibition strikes only against voluntary deeds, and not against such as the person inhibited was under a previous obligation to grant.²

[1118. What alteration on the law of inhibitions was made by the Conveyancing Act, 1874?

All inhibitions subsisting at the commencement of the Act are to prescribe not later than on the lapse of five years after said date, and all inhibitions recorded after its commencement are to prescribe on the lapse of five years from the date when they take effect. The Act also provides that inhibitions may be renewed by recording them, or a memorandum, in the Register of Inhibitions, before the lapse of the five years, and before the expiration of every subsequent period of five years. § 42, and Schedule J.]

XI. ADJUDICATION FOR DEBT.

1119. What is the nature and effect of adjudication for debt?

Adjudication is a diligence, or an action of execution (founded on a liquid document of debt), the object of which is to transfer to the creditor the heritable property of his debtor, in satisfaction

¹ A. S., 19th Feb. 1680.

² Ersk. 2, 11, 11 and 12; Menzies Lect. 821 (872).

that inhibition does not affect" "heritable bonds where no infeftment has been taken. Where, however, infeftment has once been taken, the debt is held no longer to be a mere *nomen debiti*, but a feudal estate, the conveyance of which may be barred by inhibition;" and refers to Low, 6th Dec. 1814, F.C. See also Ivory's note to Ersk. 2, 11, 11.

(o) Though the inhibition does not directly strike at the disposition, it may have effect in another way, because the purchaser is not bound to pay the price until the record is purged; Horne, 28th May, 1824, 3 S. 81. See, however, Lord Justice-Clerk Hope's observations on this case in *Livingstone*, 27th July, 1842, 5 D. 1.

Held that title-deeds deposited, after inhibition, with an agent may be hypothecated, and that, if they are necessary for the sale of the estate, he is entitled to be ranked on the price for his business account preferably to the inhibiting creditor; Menzies, 14th Dec. 1841, 4 D. 257.

of his debt, the right acquired by the creditor being redeemable by the debtor within a certain time, but convertible from a redeemable security into an absolute right of property after the expiry of the term of redemption.¹

1120. What were the leading conclusions of the summons of adjudication before the passing of the Lands Transference Act, and what modification of these conclusions did that statute introduce?

Before the passing of the Lands Transference Act, the leading conclusions of the summons were, (1) a conclusion for *special* adjudication, that *such part* of the debtor's lands described in the summons should be adjudged to the pursuer as should be worth the principal sum and interest to the date of the decree, and one-fifth part more of the principal sum, in respect the pursuer would want the use of his money, and be obliged to take land for the same, over and above the composition to the superiors and the expenses of infestment; and (2) an alternative conclusion for *general* adjudication of the *whole* lands described in the summons, for payment and satisfaction to the pursuer of the principal sum and interest to the date of the decree, according as the same should be accumulated at that date, and of the interest of the accumulated sum during the not redemption, over and above the composition to the superior and expenses of infestment.²

The Lands Transference Act declared that it should be no longer necessary to conclude for special adjudication, and that it should be lawful to conclude and decern for general adjudication, without an alternative conclusion for special adjudication.³ [The provisions of the Act of 1847 are substantially re-enacted by the Consolidation Act, § 59.]

1121. How is the adjudication completed?

An abbreviate of the decree, signed by the extractor, is recorded within sixty days of its date in the Register of Abbreviates of Adjudication; but where lands or other subjects properly feudal are adjudged, infestment or registration in the Register of Sasines is necessary, in order to the completion of the decree as

¹ Bell's Prin. 2299.

² Jur. St. iii. 335 (2nd ed.)

³ 10 & 11 Vict. c. 48, § 18.

a preferable right ;¹ and when a real right is thus established, the recording of an abbreviate is not indispensable for the adjudger's security.²

1122. How does the adjudger of an heritable security complete his title ?

The adjudger's title may be completed, whether the adjudication has been led against the creditor in the security, or against his heir duly vested therein, by recording the abbreviate of the adjudication in the Register of Sasines ; which has the same effect as if the adjudger had been entered and infeft on a charter of adjudication.³ Where the adjudication has been led against the creditor's heir-apparent, whether he shall have renounced or not, the adjudger's title may be completed by recording the decree itself in the Register of Sasines ; the adjudger, by this method, being in the same position as if an assignation of the security had been granted in his favour by the ancestor, and if such assignation had been duly recorded at the date of recording the decree.⁴ [The provisions of the two statutes referred to in notes 3 and 4, are re-enacted with amendments by § 65 of the Conveyancing Act, which takes the place of § 129 of the Consolidation Act.]

(For the forms of procedure in leading adjudications against apparent heirs, and of completing the adjudger's title, see Cases under Adjudication in Implement, p. 367.)

1123. How long does the right of redemption competent to the debtor subsist ?

The debtor may redeem the lands at any time during the currency of the *legal*, which in ordinary adjudications is ten years ; and even after the legal has elapsed the right of redemption remains with the debtor, until decree of declarator of expiry is pronounced, or until the adjudger shall have possessed the lands for forty years after expiration of the legal on a completed feudal investiture.⁵

¹ Ersk. 2, 12, 23 and 43; Bell's Prin. 825, A. 826.

² Charteris, 2nd Feb. 1714, 5 B. S. 102; Ersk. 2, 12, 26.

³ 8 & 9 Vict. c. 31, § 3.

⁴ 21 & 22 Vict. c. 76, § 27.

⁵ Ersk. 2, 12, 49 ;(p) Menzies Lect. 824 (875).

(p) Ersk. 2, 12, 22, note 345, and cases there cited.

1124. How may an adjudication be converted from a redeemable into an absolute right?

(1) By decree of declarator of expiry of the legal;¹ or (2) by forty years' possession from the date of expiration of the legal on a completed feudal investiture.²

1125. What is the legal or period of redemption in an adjudication *contra hæreditatem jacentem*; and how may the right of redemption be made available?

The legal in an adjudication *contra hæreditatem jacentem* is seven years. It is said that, unless the heir who has renounced was a minor at the date of the renunciation, the right of redemption is not directly available to him; and that the method of exercising the right, if he wish to do so, is to grant a trust-bond for a sum exceeding the value of the estate, upon which the trustee adjudging may redeem and convey to the heir.³ But it would appear from the authorities collected by Mr. Ross, that an adjudication may be redeemed by the heir when served, although he has previously renounced.^{4(s)}

1126. What is the nature and effect of an adjudication in security?

Adjudication in security is used where the debt is not yet due, and where the debtor is *vergens ad inopiam*, or the creditor is exposed to the risk of being excluded from competing with other adjudgers. It confers on the adjudger the right of ranking on the debtor's estate, but it may be redeemed at any time, and can never be converted into an absolute right of property.⁵

1127. How may an adjudication be extinguished?

(1) By payment; (2) by intromission with the rents;^{6(t)} and

¹ Campbell, M. 321.

² Ormiston, 7th Feb. 1809, F.C.(r)

³ Ersk. 2, 12, 49; Bell's Com. i. 751.

⁴ Stewart, 7th Dec. 1809, F.C. See

1 Ross L.C. 304.

⁵ Ersk. 2, 12, 9, 42; Bell's Prin. 832, 2305.

⁶ Bell's Prin. 829.

(r) Bell's Com. i. 745.

(s) A posterior adjudger may exercise the power of redemption on payment of the prior creditor's debt.

(t) Where there has been no decree of declarator of expiry of the legal.

(3) by the negative prescription, although the adjudication be followed by charter and sasine, if not accompanied with possession.¹

1128. What is meant by the "first effectual adjudication"?

This has reference to the case where there is a competition of adjudications, the "first effectual" being that which fixes the criterion of *pari passu* preference introduced by the Act 1661, c. 62, giving an equal ranking to all adjudications led before the one first made effectual, and to those led within a year and day after it. An adjudication is made first effectual, provided it has proceeded on a summons duly intimated on the Walls and in the Minute Book, (1) by *actual* infeftment on the decree, or registration of it in the Register of Sasines; or (2) by *constructive* infeftment, which is produced by lodging a draft charter and note in the office of the Presenter of Signatures, or by a general charge of horning against superiors, according as the lands are held of the Crown or of a subject, and by recording in the Register of Abbreviates a copy of the note and an abstract of the Crown Charter, or the charge of horning against the subject superior.²

1129. A, for a debt of £3000, adjudges his debtor's property, which was subsequently sold under a ranking and sale for £2000. Within a year and day of A's adjudication, which was made first effectual, B led an adjudication of the property for an equal amount; but before B raised his adjudication C inhibited the proprietor of the lands for a debt of £1000, contracted after A's, but before B's. What are the rights of A, B, and C, respectively?

The price would be equally divided between A and B, their debts being equal, and their ranking being *pari passu*, in consequence of the statutory rule of preference. C is not entitled to participate in the price, although his debt was contracted before the debt of B, and his inhibition used before B's adjudication was raised, because C could have drawn nothing from the debtor's estate though B's debt had not been contracted; and an inhibition of a creditor not adjudging does not affect a posterior adjudging

¹ Anderson, M. 10676.

² 19 & 20 Vict. c. 91, § 6.

creditor, if an adjudication has been led by another creditor for a debt contracted prior to the inhibition, and exceeding the value of the lands.¹(u)

1130. What is the rule of ranking adjudgers on the debtor's estate whose adjudications have not been led within a year and day from the date of the first effectual adjudication?

They are postponed to those creditors who have adjudged within the year and day, and are ranked according to the dates of their decrees.²

XIII. HERITABLE SECURITIES.

1131. What is a wadset, and what were the different forms by which the right was constituted?

A wadset is a form of security now obsolete, by which a proprietor impignorated or pledged his lands to his creditor in security of debt. The right was constituted originally by a charter granted by the debtor or *reverser* to the creditor or *wadsetter*, impledging the lands until payment; afterwards by a deed of alienation *ex facie* absolute and irredeemable, with a separate writing called a *letter of reversion*; and, lastly, by a mutual contract, by which the reverser, on the one part, disposed the lands, and the wadsetter, on the other part, granted the right of reversion.³

1132. What was meant by a proper and an improper wadset?

(1.) The proper wadset was that by which the wadsetter got possession of the lands with the rents and produce for the use of his money, so that the wadsetter was not obliged to account for the surplus of rents exceeding the interest, nor was the reverser bound to make up any deficiency.

¹ Miln, M. 2876; Ersk. 2, 11, 16;
¹ Ross L.C. 259.

² Ersk. 2, 12, 33.

³ Ersk. 2, 8, 4; Jur. St. i. 393.

(u) The rules of ranking of inhibiting, adjudging, and real creditors will be found fully stated Bell's Com. ii. 407 *et seq.*

(2.) The improper wadset was that under which, if the rents were less than the legal interest, the reverser was obliged to make up the deficiency; and if the rents exceeded the interest, the wadsetter was bound to impute the surplus towards extinction of the principal.¹

1133. What were letters of regress?

The writ so called was a writing obtained by the reverser from his superior when the wadset was holden *a me*, its purpose being to secure his re-entry upon extinction of the wadset, without payment of a composition.²

1134. What was meant by an eik to the reversion?

An eik to the reversion was a deed granted by the reverser, acknowledging receipt of an additional loan from the wadsetter, and declaring that the wadset should not be redeemable until both loans were paid.³

1135. How is a wadset extinguished, the redemption being voluntary?

(1) An improper wadset may be extinguished by a discharge and renunciation recorded in the Register of Sasines. (2) But where the wadset is proper, there ought to be a reconveyance with resignation *ad remanentiam*, as the provisions of the Heritable Securities Acts do not appear to apply to such rights, and it is doubtful whether a discharge and renunciation is sufficient.⁴

1136. What is a bond and disposition in security?

A bond and disposition in security is a deed granted by the borrower to the lender, containing (1) an acknowledgment of the loan, and an obligation to repay the principal sum and interest, with penalties applicable to each; (2) a conveyance to the lender of the borrower's lands in security of the principal, interest, and penalties, the lands being redeemable if the power of redemption be exercised, but irredeemable in the event of a sale in terms

¹ Ersk. 2, 8, 26; Jur. St. i. 394.

² Ersk. 2, 8, 18; Menzies Lect. 800 (848).

³ Ersk. 2, 8, 10.

⁴ Stair, 2, 10, 13; D. of Roxburghe, 9th March, 1825, 1 W. & S. App. 41; Menzies Lect. 800 (848). See Ersk. 2, 8, 17.

of the deed ; (3) an assignation to the rents and writs ; (4) an obligation of warrandice ; (5) a power of redemption ; (6) an obligation for the expenses of assigning and discharging the security ; (7) a power of sale on default in payment ; and (8) a consent to registration for preservation, execution, and publication. [As bonds and dispositions in security now require warrants of registration, a consent to registration *for publication* is not now necessary.]

[1137. What changes were introduced by the Consolidation Act, 1868, § 117, as to the succession to heritable securities ?

No heritable security granted either before or after the Act is (except in the cases thereafter provided) to be heritable as regards the succession of the creditor, but is to be moveable as regards the succession of such creditor, and to belong to his executors or representatives *in mobilibus*.]

[1138. State shortly the excepted cases referred to in the foregoing question.

(1.) The heritable security is to continue heritable as regards succession, if expressly conceived in favour of heirs, excluding executors.

(2.) Even when a heritable security is conceived in favour of executors it may be rendered heritable *quoad* succession, whether recorded or not, by the minute (Sched. DD) provided by the Act.

(3.) All heritable securities are to continue heritable (a) "*quoad fiscum*," and (b) as regards rights of courtesy and terce of husband or wife of the creditor.

(4.) No heritable security is to pertain to the husband *jure mariti* where the same is taken to the wife, or to the wife *jure relictæ* where the same is taken to the husband, unless the husband or relict have right therein otherwise. See Hodge, 7 R. 259.

(5.) Where *legitim* is claimed on the death of the creditor, no heritable security shall be held part of the creditor's moveable estate in computing *legitim*.]

1139. What is the leading difference between an heritable bond and a bond and disposition in security ?

A bond and disposition in security contains a dispositive

clause, conveying *de presenti* the lands in security of the personal obligation; whereas an heritable bond contains no dispositional clause, but only an obligation to infeft the lender in an annual rent corresponding to the amount of the interest, payable out of the lands, and also in the lands themselves, in security of the principal sum, interest, and penalties.¹

1140. What was the obstacle which formerly existed to the constitution of heritable securities for loans by way of cash-credit; and how was that obstacle removed?

An heritable security for a cash-credit, being a security for a future debt, was ineffectual under the Act 1696, c. 5, which enacted "that all dispositions or other rights that shall be granted for hereafter, for relief or security of debts to be contracted for the future, shall be of no force as to any debts contracted after the sasine following on the said disposition or right."^(x) To remedy this inconvenience, it was provided by 54 Geo. III. c. 131. § 12, and re-enacted by 19 & 20 Vict. c. 91, § 7, after the repeal of the former statute, that heritable securities may be given for cash-accounts, or for the relief of cautioners in cash-accounts, on condition that the principal sum and interest to become due under the bond shall be limited to a certain definite sum, to be specified in the security, not exceeding the amount of principal and three years' interest at five per cent.; and it is provided by the latter statute, that the heritable security shall subsist to the extent of the sum limited, or any less sum, until the cash-account is finally closed, and the balance paid up and discharged, and the infeftment renounced.

1141. How was the creditor's right under a bond and disposition in security completed before the Heritable Securities Acts; and what is now the procedure?

¹ Jur. St. i. 395.

(x) There was a further difficulty in reference to such securities—viz., that at common law heritable securities cannot subsist for a debt fluctuating in amount, but fail, irrespective of any discharge, whenever any part of the debt is paid, and do not revive although the debt should be again contracted. Apart from the statutory provision, the only mode of constituting a real security for such a debt is by absolute disposition and back-bond

Before the Heritable Securities Acts, the creditor's right was completed by infeftment on the bond ; but now the right is perfected by registration in the Register of Sasines, without infeftment. [A warrant of registration is now necessary.]

1142. What is the effect of the registration of a bond and disposition in security in the Register of Sasines ?

The registration of the bond is as effectual, to all intents and purposes, as if it had contained, in the case of subjects held by the ordinary tenures, an obligation to infeft *a me vel de me*, procuratory of resignation, and precept of sasine, and in the case of burgage subjects, an obligation to infeft *more burgi* and procuratory of resignation, and as if sasine, or resignation and sasine, had been duly made, accepted, and given thereon, in favour of the original creditor, and an instrument of sasine, or of resignation and sasine, had been duly recorded at the date of the registration of the bond and disposition in security. [Consolidation Act, 1868, § 118.]

1143. What is the form of voluntary conveyance by which heritable securities are transmitted ?

Simple assignation, containing merely a transference of the security and the lands, and a reference to the register in which the security, or the sasine upon it, is recorded [Consolidation Act, 1868, Schedule GG]; the assignee's right being completed by registration of the deed in the Register of Sasines. Where the assignation is granted, not by the original creditor, but by a prior assignee, the title of the latter is deduced in the assignation.

[1144. Where the creditor, in a heritable security from which executors are excluded, has died after recording the bond in the Register of Sasines ; How does his heir make up a title ?

(1.) By writ of acknowledgment granted by the debtor duly infeft, and registration of the writ in the Register of Sasines. Consolidation Act, 1868, Schedule II and § 125, as corrected by the Conveyancing Act, 1874, § 63.

(2.) If a writ of acknowledgment cannot be obtained, the

heir's title may be completed by decree of general or special service, and notarial instrument (Schedule JJ), and § 128.]

[1145. Where the creditor has died before recording the bond ; How does his executor or general disponent make up a title ?

By notarial instrument in the form of Schedule MM of the Consolidation Act, 1868, and § 130.]

[1146. Where the assignee of a recorded bond has died before recording the assignation ; How does his executor, disponent, assignee, legatee, or heir make up a title ?

By notarial instrument in the form of the schedule mentioned in the previous Answer ; when taken in favour of an heir, a decree of general or special service being presented to the notary as one of the warrants of the instrument.]

[1147. Where the assignee has died after recording the assignation ; How does his heir complete a title ?

(1) By writ of acknowledgment ; or (2) by general service and notarial instrument. See Answer 1144.]

[1148. How does a general disponent complete a title to a recorded bond and disposition in security ?

By expediting and recording a notarial instrument in the forms of (1) Schedule L of the Consolidation Act, 1868 (a form, however, rather intended for lands, and not now usually adopted in practice) ; (2) Schedule KK of the same Act ; or (3) Schedule N of the Conveyancing Act, 1874.]

1149. Where a special assignation of an heritable security is contained in a deed of conveyance of other properties ; How does the assignee complete his title ?

[By expediting and recording a notarial instrument in the form of Schedule HH of the Consolidation Act, 1868.]

1150. How does a judicial factor on a testamentary trust-

estate complete his title to heritable securities held by the truster?

(1.) Where the trustees have not made up a title—the judicial factor may complete his title by recording in the Register of Sasines his act and warrant of special powers, the securities being specified in the warrant. [Consolidation Act, § 24.]

(2.) Where the trustees have made up a title and are still living,—by assignation from the trustees and registration; or by adjudication against the trustees, and registration of an abbreviate of the decree in the Register of Sasines.

(3.) Where the trustees have made up a title and are all dead,—by declaratory adjudication against the heir of the last survivor, and charter of adjudication from the debtor of whom the security is held, and infestment on or registration of charter.

[The proceedings mentioned in (2.) and (3.) are rendered unnecessary by § 44 of the Conveyancing Act, which provides that if a trust-title has been completed, any person appointed by the Court to administer the trust, by recording in the Register of Sasines an extract of the interlocutor appointing him, and containing references to the trust-deed and recorded titles, and setting forth the lands (in which expression heritable securities are included) by description or reference, shall operate a title by infestment in the same way as if he had been a trustee named in the recorded title.]

1151. How does a trustee on a sequestrated estate, or the liquidator of a joint-stock company, or the company, complete a title to heritable securities held by the bankrupt?

[By expediting and recording a notarial instrument under the Consolidation Act, Schedule LL, and § 25.]

1152. A purposes to lend money to B, on an assignation to be granted by him of a bond and disposition in security in his favour by M. On examination, it is found that M's title is complete, that the bond is correctly framed and duly recorded, that it is the only burden affecting the property, and that the value of the property is amply sufficient for the loan; Is there anything else required for A's security?

Unless A has full confidence in B, he should, as recommended in the Style Book, obtain, along with the assignation, an acknowledgment of the subsistence of the debt from M ; as the bond may have been extinguished by payment, *concursus debiti et crediti*, or an unrecorded discharge.¹(l)

1153. What is the form of deed by which heritable securities are extinguished ?

A discharge [Consolidation Act, 1868, § 132, Schedule NN], by which the creditor discharges the bond, and all interest due on it, and declares the lands to be redeemed and disburdened ; the deed being completed by registration in the Register of Sasines. Where the discharge is granted, not by the original creditor, but by a person who has acquired right to the security by assignation or otherwise, the granter's title is shortly deduced in the discharge.(m) [The enactment quoted in the note is in substance re-enacted by § 150 of the Consolidation Act.]

¹ Rankin, M. 572 ; 2 Ross L.C. 707 ; Jur. St. 4th edit. i. 676.

(l) In one case, where lands had been sold in a sequestration, it was attempted, but unsuccessfully, to set aside an heritable security on the ground that it had been granted for a debt constituted by bills which had been renewed since the date of the security ; M'Nair, 16th Feb. 1827, 5 S. 372.

(m) By the 23 & 24 Vict. c. 143, § 28, it is provided that "when any lands, whether held burgage or not, disposed under the authority of an Act of Parliament in excambion for other lands, are burdened with debts, the lands so disposed shall, from and after the date of registration in the appropriate Register of Sasines of the contract or deed of excambion of such lands, be freed and disburdened of such debts so far as previously affecting the same, and shall be burdened with the debts, if any, which previously affected the lands acquired in exchange for the same, in the order of preference in which such debts were a burden upon such last mentioned lands." Before any such excambion is authorised, "such intimation as the Court of Session may consider necessary shall be made to all creditors having interest," who may "state any objections thereto, of which the Court shall judge." In the contract or deed of excambion, or in a schedule subscribed as relative thereto, and recorded therewith, "there shall be set forth as to each of the said debts the following particulars, namely, the amount of the debt, the date of recording, the writ by which its constitution was originally published, the register in which the same was so published, the name and designation of the original creditor, and, if the debt has been transferred, the name and designation of the creditor understood to be in right thereof for the time, and the date of recording the writ whereby his right was published, and the register in which the same was so published :

1154. How does the debtor in a bond and disposition in security exercise the power of redemption?

(1.) The debtor makes notarial premonition of three months to the creditor, to attend at the place of payment,⁽ⁿ⁾ and receive the amount due under the bond; with certification, that if he fail to appear, or refuse to receive payment, the amount would be consigned [in the bank specified in the security, if any bank shall be so specified, and if not, then] in a chartered bank [or bank incorporated by Act of Parliament] specified in the notice, and having an office at that place. The evidence of this step of the procedure is a notarial instrument of premonition. [Consolidation Act, 1868, § 119.]

(2.) The debtor, or his procurator, along with a notary and witnesses, attend on the day and at the place appointed, and in the event of the creditor's absence, or refusal to receive the amount, the debtor consigns it in bank, and protests that the lands shall thereafter be holden as duly redeemed; and a notarial instrument of consignation is then expedited.

(3.) The debtor then raises an action of declarator of redemption against the creditor, to have it found and declared that the order of redemption has been duly observed and fulfilled by the debtor, and that thereby the bond and disposition in security is legally extinguished, and the lands redeemed and disburdened. The decree is recorded in the Register of Sasines.

[The proceeding mentioned in the foregoing paragraph (3.) is rendered unnecessary by § 49 of the Conveyancing Act, which provides that when a debtor shall have exercised his right of redemption, but from the death or absence of the creditor or other cause cannot obtain a discharge, he may consign the sum due, principal and interest, and thereupon obtain from any notary-public a certificate in terms of Schedule L, No. 2. The recording of this certificate in the Register of Sasines is to have the effect of completely disencumbering the lands.]

and "in such contract or deed of excambion such debts shall be expressly declared to burden the lands to which the same are transferred."

(n) The notice must be given either for the term of payment in the bond or for a term of Whitsunday or Martinmas thereafter; and the place of payment should be the office of the bank, if any, specified in the bond; 10 & 11 Vict. c. 50, § 3.

1155. How does the creditor exercise the power of sale?

(1.) A notarial intimation, requisition, and protest, at the instance of the creditor, is served on the debtor(*p*) narrating the terms of the bond, that it remains due and unpaid, and therefore requiring the debtor, within three months, to make payment: with certification that, in case of his failure to do so, the debtor should incur the penalty in the bond, that the power of redemption should thenceforth cease and determine, and that the creditor, after the expiration of the notice, should sell the lands by public roup at such price as they should bring.(*q*) The evidence of the notice is a notarial instrument of intimation, requisition, and protest. [By the Consolidation Act, § 119, a short form of schedule is provided (FF, No. 2), and a copy of the schedule with a certificate by the notary thereon is to be evidence of the demand. Where the demand has been intimated to more persons than one, a copy of the demand intimated to one and certified with an additional notarial certificate that a similar demand has been intimated to the other persons, is to be sufficient evidence.]

[(2.) After the expiration of the three months' notice, the sale is advertised once a-week for six weeks, in an Edinburgh or Glasgow newspaper, and also in a newspaper published in the county where the lands are situated, or if there be no newspaper published in that county, then in a newspaper published in the next, or a neighbouring county; the place of sale being at Edinburgh or Glasgow, or at the head burgh of the county within which the lands, or the chief part thereof, are situated, or at the burgh or town sending or contributing to send a member to Parliament, or at the burgh or town which has adopted the General Police Act, which should be nearest to the lands, whether within or without the county. Consolidation Act, § 119.]

(*p*) Personally, or at his dwelling-place, if within Scotland; or if further thereof, at the office of the keeper of the Record of Edictal Citations.

Where the debtor and trustees named by him were dead, the Court, on the petition of an heritable creditor, appointed a judicial factor to enable the creditor to give the requisite notice of sale to him; Reid, 21st Feb. 1852, 1 Stu. 490.

(*q*) The Court have an equitable right of control in regard to the upset price for the protection of the interest of postponed heritable creditors; Kerr, 23rd Dec. 1848, 11 D. 301.

(3.) The creditor executes articles of roup, and at the time and place advertised, the property is brought to sale, either in whole or in lots.(r)

(4.) If the property is sold, the creditor grants an absolute disposition to the purchaser, containing all usual clauses, and, in particular, a clause binding the granter of the bond, and his heirs, in absolute warrandice of the disposition, and obliging him to corroborate and confirm the same, and to grant all deeds necessary for rendering the sale effectual. [Consolidation Act, § 119.] The creditor, on receipt of the price, is bound to hold count and reckoning with the debtor, or with any other party having interest, and to consign the surplus in a chartered or incorporated bank, in the joint names of the seller and purchaser for behoof of the party or parties having best right thereto; the particular bank in which the consignment is to be made being specified in the articles of roup [the same Act, § 122].

1156. What is the effect of the sale and consignment of the surplus of the price?

The sale is as valid and effectual to the purchaser as if made by the granter of the security himself, and that whether the granter shall have died before or after the sale, and without the necessity of confirmation by him or his heirs, and notwithstanding that the party, debtor in the security and in right of the lands at the time, shall be in pupilarity or minority, or subject to any legal incapacity. And upon consignment of the surplus, if any be, the disposition by the creditor to the purchaser has the effect of completely disencumbering the lands of all securities and diligences posterior to the security of such creditor, as well as of the security and diligence of such creditor himself [Consolidation Act, §§ 121 and 123. The Conveyancing Act, § 48, and Schedule L, No. 1, provides a form of notarial certificate for use when there is no surplus of the price. When recorded, it has the effect of disencumbering the lands of all securities and diligences prior and posterior to those of the selling heritable creditor.]

1157. What is necessary in order to the constitution of a real burden by reservation?

(r) It is illegal for the creditor selling to become the purchaser; Taylor, 20th Jan. 1846, 8 D. 400.

(1) The burden must be of definite amount ; (2) the person in whose favour it is constituted must be expressed ; (3) words must be used declaring the burden a real burden affecting the lands ; and (4) these particulars must be transferred to the record.¹(i)

1158. A disposition declared that it was granted with and under the burden of payment of £100 to A, and the declaration was engrossed in the sasine, and transferred to the record ; Was a real burden effectually constituted ?

No ; these terms import nothing more than a personal obligation on the grantee.²

1159. A disposition was granted to A, under burden of paying to the granter's younger children the sums provided to them in a separate bond of provision, in which the sums and the children's names were specified, and it was declared that the granter had burdened with these sums his "real estate, disposed by me to A by disposition thereof in his favour, of this date, and relative hereto." The sums, the children's names, and the declaration of the burden

¹ Duff's Feud. Conv. 194 ; Menzies Lect. 794 (842).

² M'Intyre, 3rd Feb. 1824, 2 S. 664.

(i) A disposed, "but with and under the burden of the foresaid price thereof (£17,700), and also with and under the burdens, conditions, provisions, and restrictions hereinafter engrossed, heritably and irredeemably, all and whole the coal seams and coal heughs in all and whole the following" lands, &c., and, "with and under this further condition, that the said B, &c., and their foresaid, shall pay jointly and severally, all damages of every description which may be occasioned to the mansion-house, gardens, &c., by their working the coal or by their driving levels," &c. Held that, in regard to the claim of damages, the terms were such as to constitute only a personal obligation, and not a real burden ; Baird's Trs., 6th Feb. 1846, 8 D. 464.

A disposed certain subjects, under burden of an annuity of £15 to each of his five daughters *nominatim*, to be continued on their deaths respectively in favour of their children (then unborn), and upon the death of the children, to be continued in favour of grandchildren, which provisions he declared to be a real burden on the lands. Held that a real burden was effectually created in favour of the whole three generations ; Erskine, 1st March, 1843, reported 24th June, 1846, 8 D. 863.

were engrossed in the sasine, and transferred to the record ; Was a real burden duly constituted ?

No ; because the burdens must appear in the deed itself, reference to a separate deed being insufficient, and it being incompetent to insert anything in the sasine not contained in the disposition, which is its warrant.¹

1160. How is a real burden transmitted ?

By assignation, intimated to the debtor whose sasine is burdened, and by registration of the assignation in the Register of Sasines.² [Intimation is now unnecessary, when the assignation is recorded in the Register of Sasines, as, by § 30 of the Conveyancing Act, real burdens may be assigned or discharged as nearly as may be in the forms applicable to heritable securities under the Consolidation Act.]

1161. How does the heir of the creditor in a reserved burden make up his title ?

By general service to the creditor.³ [Real burdens (except ground-annuities) are now moveable as regards succession, unless executors are expressly excluded. Conveyancing Act, § 30.]

1162. Does a reserved burden authorise a poinding of the ground, or an action of mails and duties ?

A reserved burden, being real, authorises a poinding of the ground ; but not being a title of possession until followed by adjudication, it does not authorise an action of mails and duties.⁴

1163. A party having purchased an estate under a reserved burden of £3000, disposed it to his daughter, and then executed a trust-settlement of his moveables, the first purpose of which was to pay his debts ; Was the daughter entitled to demand that the trustees should pay off the reserved burden on the estate ?

No ; because the estate having been acquired by the father

¹ Allan, M. 10265 ; aff. 3 Ross L.C. 10.

² Miller, 8th Feb. 1820 ; 3 Ross L.C. 29. Hume, 540.

³ Cuthbertson, 7th March, 1806, M. App. "Service," No. 2.

⁴ Stair, 4, 35, 24 ; and 4, 23, 5 ; Bell's Prin. 922.

under the reserved burden, it was disposed *tantum et tale*, as belonged to himself, and a trust-conveyance of moveables, with general direction to pay the debts of the truster, does not relieve the heir from payment of a debt secured as a real burden on the lands.¹

1164. Where a security is constituted by absolute disposition and back-bond ; What is the effect of recording the latter in the Register of Sasines ?

(1) The personal obligation to denude on payment is, by registration of the back-bond, made a real limitation of the creditor's right.² (2) The right is restricted to a security for advances expressed in the back-bond, or, where it is conceived in general terms, to the sums actually advanced and due at the time.³ Registration of the bond protects the creditor from liability to the superior as owner.⁴(x)

¹ Henderson, 29th Jan. 1858, 20 D. 478.

² Bell's Prin. 912.

³ Keith, M. 1163 ; Duff's Feud. Conv. 295.

⁴ Clark, 20th June, 1850, 12 D. 1047 ; Menzies Lect. 812 (861).

(x) The case of Clark seems hardly to warrant the statement here made. The judgment in the Court of Session found generally "that as the title of the disponent was *ex facie* absolute, he was to be held as fully vested in the fee and liable to all the obligations incumbent upon the vassal ;" and nothing seems to have been decided as to the effect of registration of the back-bond, which indeed had never taken place, though the deed was produced in process. In the subsequent case of Gardyne, 8th March, 1851, 13 D. 912, where the subject was burgage, burdened with a ground-annual, it was held that, though the creditor recorded the back-bond and also a renunciation of the security, he was not thereby relieved of the liability to pay the ground-annual, but "that he must remain liable" "until a title is completed in favour of another vassal." The judgment in this case was reversed on appeal (Royal Bank of Scotland, 18th May, 1853, 15 D. 45) ; but on the ground, distinguishing between ground-annuals and feu-duties, that "a purchaser of lands is not personally liable for a ground-annual with which the disponent and lands are burdened." The Lord Chancellor, however, observed—"In accordance with the view taken by the majority of the judges, that where the law allows and enables parties to burden their property by conveyances on the face of them absolute, it may give rise to great difficulties if such instruments are not to have all the qualities which on the face of them they purport to have." So far, therefore, as there is any authority on the point, it seems to be rather adverse to the view stated in the answer.

1165. Where the right of reversion in the back-bond is burdened with a specified sum only, and where the creditor has made further advances; Can the debtor demand a reconveyance on payment of the sum specified, the bond not being recorded?

No; until registration or judicial production of the bond the security covers all debts owing to the disponee, at whatever time contracted.¹

1166. How does the heir of the debtor make up his title?
By general service.²

1167. What is the proper method of extinguishing a security constituted by absolute disposition and back-bond?

The security may be extinguished by renunciation where the back-bond has been recorded in the Register of Sasines. But whether it is recorded or not, Professor Menzies says, "the right is most conveniently and satisfactorily extinguished by resignation *ad remanentiam*."³

1168. What is a contract of ground-annual?

A contract of ground-annual, which is employed where subinfeudation is legally impossible, or conventionally prohibited, is a bilateral deed of conveyance granted in consideration of a fixed yearly return, for which the disponee grants his personal obligation (*y*) to the disponent, and which is likewise made a real burden

¹ Maitland, 23rd Nov. 1827, 6 S. 109; Russell, 18th June, 1829, 7 S. 767; aff. 4th April, 1831, 5 W. S. 256; Duff's Feud. Conv. 295. ² Ersk. 3, 8, 77; Ersk. Prin. 3, 8, 29. ³ Menzies Lect. 812 (861).

(*y*) It was held in several cases in the Court of Session that the burden of a ground-annual followed the subjects and was enforceable against the proprietor for the time being, but did not continue to affect personally the original disponee or his heirs after they had been divested; Peddie, 27th Feb. 1846, 8 D. 560; Small, 3rd Feb. 1849, 11 D. 495; Gardyne, *supra*, note (x), p. 545; but the House of Lords reversed the judgments in the last two cases (Millar, 17th March; Royal Bank, 13th May, 1853, 15 D. 38 and 45), and found that the personal obligation subsists against the party who undertook it and his heirs, though divested of the lands, and that subsequent disponees did not incur any personal liability, and that as regards them, the ground-annual could be recovered only from the lands. In these cases, Peddie, *supra*, was noticed as wrong decided.

on the lands. The deed resembles a feu-contract, and contains similar provisions and stipulations, but it does not create a new fee, the yearly return being merely a burden on the disponee's infestment, and depending, for its efficacy, upon publication in the registers. [Reference is made to the modern form of contract of ground-annual, Jur. Styles, i. 134. Ground-annuals may be transmitted under the ordinary heritable security styles, but it will be kept in view that they remain heritable as to succession, Consolidation Act, § 117 ; Conveyancing Act, § 30.]

[1169. What is poinding of the ground ?

Poinding of the ground is a real diligence by which a creditor holding a real right attaches the debtor's moveables so long as they remain on the ground, not completely transferred, also the tenants' moveables on the ground, but only to the extent of the rents due by them or current at the time. "It is a combination of a real petitory action and a real diligence." Lord Deas in *Royal Bank*, 4 R. 985. See as to the effect of serving the summons of poinding the ground, *Lyons*, 8 R. 24.]

XIV. LEASE.

1170. What is a lease ?

A lease is a contract by which the use of land or other heritable estate is granted to the lessee or tenant for a fixed yearly rent, or duty to be paid or performed by him to the lessor or landlord, either in money, the fruits and produce of the ground, or services.

1171. By what statutes were leases rendered effectual against singular successors ?

The Court of Session applied the same rule to the personal obligation for the feu-duty in feu-contracts ; *King's College of Aberdeen* ; *Brown's Tra.*, 11th March, 1852, 14 D. 675 ; but here also the House of Lords reversed, 11th August, 1854, 17 D. 80. There is a difference, however, in the other respect in regard to feu-duties—viz., that the vassal for the time is personally liable for them, there being privity of estate between the superior and him ; *Millar*, in *H. of L. ut supra*. In one case, where trustees were ordained to enter in subjects, the annual value of which was less than the feu-duty, it was held that they were "not bound so to enter as vassals, or accept a charter from the pursuers, as to undertake or subject themselves to any personal liability *ultra valorem* of the trust-estate ;" *Leith Dock Commissioners*, 8th June, 1860, 22 D. 1072.

(1.) By the Act 1449, c. 18, it is ordained, "for the saftie and favour of the puir people that labouris the ground, that they and al utheris that hes taken or sal take landes in time to come fra Lordes, and hes termes and zeires thereof, that suppose the Lordes sell or analy that land or landes, the takers sall remaine with their tackes unto the ischew of their termes quhais handes that ever thay landes cum to, for siclike mail as they tooke them for." Under this statute, possession was indispensable.

(2.) By the Registration of Leases Act, 1857, it was enacted, that certain descriptions of probative leases for a period of thirty-one years or upwards (See Ans. 1173), registered in the Register of Sasines, should, by virtue of such registration, (a) be effectual against any singular successor, whose infetment is posterior in date to the date of the registration,¹ in the same manner as if the grantee had entered into actual possession of the subjects leased at the date of registration.²(b)

1172. What are the requisites of an unregistered lease in order to be effectual against singular successors?

(1) The lease must distinctly specify the subject let; (2) it must contain a specific rent; (3) it must contain a definite ish; and (4) it must be followed by possession.

1173. What are the requisites of a lease which may be registered under the Registration of Leases Act?

(1) The lease must be probative. (2) It must contain a specific rent. (3) The endurance must be for thirty-one years or upwards,³ or the lease must contain an obligation to renew from time to time so as to endure for a period of thirty-one years or upwards.⁴ (4) The lease must specify the subject. (5) In leases executed after the date of the Act, if not granted in terms of an

¹ 20 & 21 Vict. c. 26, § 2.

³ *Ibid.* § 1.

² *Ibid.* § 16.

⁴ *Ibid.* § 17.

(a) "If valid and binding, as in a question with the granters thereof."

(b) The recording is to be "at or subsequent to the date of entry," and is not necessary "except for the purposes of this Act;" and "all such leases which would under the existing law, prior to the passing of this Act, have been valid and effectual against any such singular successor as aforesaid, shall, though not recorded, be valid and effectual against" him as well as against the granter; 20 & 21 Vict. c. 26, § 2.

obligation to renew contained in a lease dated before the Act, (c) the extent of the subjects (unless these consist of mines, minerals, or burgage subjects) (c) must not exceed fifty acres; but no leases executed before the date of the Act are excluded from registration in respect of the extent of the subjects let. (6) In leases of subjects not burgage, executed after the Act, if not a renewed lease as above mentioned, the name of the lands of which the subjects let consist or form a part must be mentioned. (7) In leases executed after the Act, if not a renewal as above mentioned, the extent of the subjects let must be mentioned, excepting in leases of burgage subjects, and of mines and minerals.¹

1174. May leases of ordinary duration be granted by a liferenter, or a tutor, or a minor with consent of his curators?

(1) A lease granted by a liferenter is limited to the duration of the liferent;² (d) (2) a lease by a tutor expires with his office;³ (e) (3) a lease by a minor, with consent of his curators, subsists till its natural expiry.⁴

(For effect of verbal leases, see Ans. 170).(f)

¹ 20 & 21 Vict. c. 26, § 18.

² See Ans. 82.

³ Bell's Prin. 1183.

⁴ *Ibid.*

(c) This seems to be a mistake; no lease whatever executed after the passing of the Act (except of mines and minerals) falls within its operation if the extent of land exceeds fifty acres. See Act, § 18.

(d) Unless greater powers are conferred by the liferent right.

(e) This is the rule under the ordinary powers of administration, but, on cause shown, the Court will authorise tutors to grant leases to extend beyond their period of office. Thus, tutors-nominate have been authorised to grant leases of farms for nineteen years, Halkett, 24th Nov. 1847, 10 D. 146; of farms for nineteen years, minerals for thirty-one years, and waterfalls for twenty-one years, Speirs' Tutors, 11th July, 1848, 10 D. 1474; of farms for nineteen years, Morrison, 19th July, 1861, 23 D. 1313. Tutors-at-law have been authorised to grant leases for twenty-one years, Brown, 11th Dec. 1846, 9 D. 250; for fifteen years, Kincaid, 5th July, 1856, 18 D. 1208. In this case it was held that The Pupil's Protection Act, 12 & 13 Vict. c. 51, § 28, gives the Court authority to grant such powers to tutors-at-law. See also Fraser, 9th June, 1857, 19 D. 801.

(f) In a removing, the defender, who had previously been in possession on a nineteen years' lease, which had expired some years before, pleaded a verbal agreement for a new lease for nineteen years. Held that a letter written by

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(2.) The debtor, or his procurator, along with a notary and witnesses, attend on the day and at the place appointed, and in the event of the creditor's absence, or refusal to receive the amount, the debtor consigns it in bank, and protests that the lands shall thereafter be holden as duly redeemed; and a notarial instrument of consignment is then expedited.

(3.) The debtor then raises an action of declarator of redemption against the creditor, to have it found and declared that the order of redemption has been duly observed and fulfilled by the debtor, and that thereby the bond and disposition in security is legally extinguished, and the lands redeemed and disburdened. The decree is recorded in the Register of Sasines.

[The proceeding mentioned in the foregoing paragraph (3.) is rendered unnecessary by § 49 of the Conveyancing Act, which provides that when a debtor shall have exercised his right of redemption, but from the death or absence of the creditor or other cause cannot obtain a discharge, he may consign the sum due, principal and interest, and thereupon obtain from any notary-public a certificate in terms of Schedule L, No. 2. The recording of this certificate in the Register of Sasines is to have the effect of completely disencumbering the lands.]

and "in such contract or deed of excambion such debts shall be expressly declared to burden the lands to which the same are transferred."

(n) The notice must be given either for the term of payment in the bond or for a term of Whitsunday or Martinmas thereafter; and the place of payment should be the office of the bank, if any, specified in the bond; 10 & 11 Vict. c. 50, § 3.

a question with him and his heirs, is not effectual against a purchaser or other singular successor, who is not bound to represent the granter.¹ (2) A lease by an apparent heir is not effectual [as an heir has now by survivance a vested personal right to the lands, a lease by him will be binding on his creditors and singular successors] against the granter's creditors or singular successors; but it will be binding on subsequent heirs in terms of the statute 1695, provided the apparent heir who granted the lease had been three years in possession of the estate.²

1178. What is the effect of a lease granted to endure till a certain debt should be paid, and the rent in the meantime to be applied in extinction of the interest?

The lease will be binding on the granter and his heirs, but not on singular successors, "having neither right nor duty."³

1179. What is the effect of an unregistered tack, granted for 1000 years, or one for nineteen years, but containing an obligation for constant renewals in all time to come?

A lease for 1000 years, though unregistered, if followed by possession, appears to be effectual against singular successors, as it has a definite right; ⁴(i) but one for nineteen years, containing an obligation for perpetual renewals, if not registered, is not effectual against singular successors, at least after the expiration of the first period of nineteen years.⁵(k)

¹ Bell's Prin. 1181; Lowden, M. 5270.

² Killilung Tenants, 22nd July, 1760, 5 B. S. 877; Gordon, M. 10309; Knox, M. 5276.

³ L. Ley, M. 7195; Bell's Prin. 1193.

⁴ Lord Advocate v. Fraser, 30th March, 1762, M. 15196, H. of L.; Denniston, 16th Feb. 1808, M. App. "Tack," No. 15. See More's Notes, 247.

⁵ Bell's Prin. 1194, and cases cited.

(i) Tack for 1260 years sustained, Irvine, 27th June, 1760, M. 15199.

(k) But such a lease was sustained against a singular successor who accepted of a disposition with an exception of tacks and obligations to grant tacks; Wight, M. 15199.

Where the entry under a lease was declared to be "to the grass and houses at Whitsunday last, and to the arable lands at the separation of the current crop," and there was an obligation to renew on a tender and demand, "at least twelve months before the expiry of the" term. Held that the demand fell to be made at least twelve months before the term of Whitsunday in the year of expiry; Wight, H. of L., 27th May, 1864, 2 M'P. 35; aff. Court of Session, 10th July, 1863, 1 M'P. 1097.

1180. May a lease be assigned, or sub-let, or adjudged by creditors, if it does not contain an exclusion of assignees and sub-tenants?

(1.) In leases of ordinary endurance the tenant cannot assign or sub-let without express power.

(2.) In leases of extraordinary endurance, and also in leases of urban subjects for a term of years, the tenant has power to assign and sub-let unless assignees (*l*) are expressly excluded.¹ But where an urban tenement has been let for a single year only, the tenant, it has been held, is not entitled to sub-let it without the landlord's consent.²

(3.) Leases are adjudgeable by the tenant's creditors, unless there is an express clause of exclusion. But the exclusion of assignees is effectual, not only against voluntary assignees, but also against assignees by adjudication.³(*m*)

1181. If an agricultural lease of ordinary endurance were assigned to the tenant's eldest son, or to his second son, Would the assignation be challengeable by the landlord?

(1) An assignation *inter vivos* to the tenant's heir-at-law is not challengeable by the landlord, although assignees are expressly excluded.⁴ (2) But the landlord may object to an assignation to the tenant's second son, or any other person than his heir-at-law.⁵

¹ Ersk. 2, 6, 31 and 32; Bell's Prin. 1216.

² Gordon, 15th June, 1825 (4 S. 95); More's Notes, 248.

³ Elliot, M. 10333; Cunningham, M. 10410.

⁴ Hepburn, M. 10409; Crawford, 5 B. S. 620; Bell's Prin. 1219.

⁵ Deuchar, M. 15295; Cunningham, M. 15298; Lowden, M. "Tack," App. No. 10.

(*l*) And sub-tenants, Trotter, 22nd Nov. 1770, F.C., M. 15283.

(*m*) Where assignees are excluded, except with the landlord's consent, he is not obliged to give any reason for withholding his consent, nor is any reason which he may assign subject to the review or control of the Court; Muir, 20th Jan. 1820, F.C. So held in regard to a lease of minerals in favour of the tenants, "and their heirs and successors, or to their assignees and sub-tenants, but under this condition always, that" "the assignation or the sub-tack shall be, and shall only be, with the written consent of the proprietor or his successor;" D. of Portland, 9th Nov. 1865, 4 M.P. 10.

Where power to assign is conferred, it includes power to sub-set.

1182. Where assignees are expressly excluded, is an assignation of the lease to the tenant's second son reducible at the instance of the heir-at-law?

No; the heir of the tenant cannot found on the exclusion; the objection being competent to the landlord alone.¹(n)

1183. A lease of lands was granted in implement of a trust-settlement by the trustees to "A and B, and the longest liver of them, whom failing, to their son C, and his heirs and assignees," for the space of thirty-eight years. After the death of B, A sub-let the lands to D till the expiry of the thirty-eight years; Was C excluded by the sub-lease after the death of A?

No; because the tack was not a thirty-eight years' lease in the person of A and B,^(o) and the survivor had no power to sub-set for a longer period than his life, the words "whom failing" occurring in a lease not being construed as in a destination of real estate.²

¹ Hay, M. 15297; M'Coag, 12th May, 1803, Hume, 813.(n)

² Macalister, 22nd Feb. 1859, 21 D. 560.

(n) Where the tenant under a lease excluding assignees was sequestrated under the Bankruptcy Act, and the landlord gave his consent to the judicial assignation in favour of the trustee on condition that he should on certain terms renounce the lease; held that the exclusion operated in favour of the landlord alone, and that the tenant could not interfere with the arrangement; Dobie, 2nd March, 1864, 2 M'P. 788.

(o) In Macalister, the defender tried to support his case by pleading that it was a thirty-eight years' lease in the persons of A and B, and it was observed by the Court that it was not so; but the judgment seems to have proceeded on the construction of the words of the lease, under which it was held that A and B had no right, except for the period of their respective lives, after which C's right took effect, and therefore that neither of them could convey to any one else any right to subsist beyond the period of the life of the survivor.

The assignation in the above case, which was gratuitous, contained a clause of absolute warrandice, on which the representatives of the assignee brought an action of damages against those of the granter. Held that the clause must be construed literally, and receive effect; Macalister, 28th Feb. 1866, 4 M'P. 495.

1184. Is an assignee or an adjudger of a lease liable for arrears of rent?

Yes; an assignee or adjudger claiming the benefit of the lease, and thus taking the tenant's place, is bound to fulfil all the obligations incumbent on the tenant by the lease.¹

1185. A, having power to assign, granted an assignation to B, and B intimated the assignation to the landlord, and granted a sub-lease to A, who remained in possession; Was the assignation effectual in a question with A's creditor's adjudging the lease?

No; because the intimation to the landlord, and the granting of a sub-tack to the cedent, were not sufficient acts of possession under the assignation, as they did not give the public any notice of the change.²

1186. Does the marriage of a female tenant void a lease in which assignees are excluded?

No; because the husband takes the lease, not as assignee, but as administrator for his wife.³

1187. On the tenant's bankruptcy, how may his trustee render the lease available to the creditors, assignees being excluded?

By arranging that the tenant himself shall continue in possession as manager for behoof of the creditors; but if the lease declares that it shall be void on the tenant's bankruptcy, no such arrangements can be made unless with the landlord's consent.⁴(*p*)

1188. Where it is stipulated in the lease that the landlord shall pay to the tenant, on his removal, the expense of buildings made by him during the currency of the

¹ Lamington, M. 15277; Ross, M. 1830, 8 S. 647; aff. 23rd Sept. 1831, 15290; Nisbet, M. 15268; Cuthill, 5 W. S. 476.
21st Nov. 1818, F.C.

² Gillon, M. 15286, aff.

³ Wallace, 4th Jan. 1751, Elchies, "Tack," No. 17; Brock, 5th March,

⁴ Bell's Prin. 1218.

(*p*) But if the tenant, though insolvent, is not made bankrupt, the arrangement might be effectual.

lease ; Is such a stipulation binding on a singular successor ?

Yes ; because a singular successor "being entitled to enforce the obligations incumbent on the tenant, is liable for those payable by the landlord."¹ But this rule does not apply to heirs of entail.²(*r*)

1189. May a tenant retain the rent for his claims against the landlord ?

The general rule is, that the counter claims of a tenant, unless liquid and ascertained, cannot be pleaded against the landlord's claim for rents ; and that retention is not a competent mode of enforcing performance of the landlord's illiquid counter obligations. More favour, however, is given to the tenant's plea of retention at the close than at the commencement of the lease' [Davie, 3 R. 1114.]

1190. What is the effect, as against singular successors, of a stipulation that the tenant shall be entitled to retain the rent in extinction of a debt due by the landlord, or to defray the expense of specified meliorations ?

(1) A power to retain the rents in extinction of a debt due by the landlord is not effectual against a singular successor ;⁴ unless he has been taken bound to warrant the lease with full knowledge of its provisions.⁵ (2) A stipulation, not separate,(*s*) but

¹ Arbuthnot, M. 10424 ; Morison, M. 10425 ; More's Notes, 253.

² Jolly, 24th Feb. 1824, 2 S. 730.

³ Bell's Com. (Shaw's Edit.) ii. 878 ; Dickson, 12th Nov. 1852, 15 D. 1 ; Sprot, 8th Feb. 1853, 15 D. 376 ;

Dods, 4th Feb. 1854, 16 D. 478. See Gray, 10th Dec. 1840, 3 D. 203.

⁴ Mactavish, M. 1736, 15248 ; Cranston's Crs., M. 15218.

⁵ Bell's Prin. 1202.

(*r*) As a general rule, heirs of entail are not liable for the debts of their predecessors in the estate. The case of Jolly, cited, proceeded, in so far as it relates to the point here referred to, on the construction of the prohibition to contract debt, in regard to which "the Court were of opinion that though there might possibly be cases where an obligation to pay for ameliorations at the expiry of a lease would not fall under a prohibition to contract debts, yet it did so in the present case." An imperfect prohibition to contract debt is, under the Amendment Act, fatal to the entail.

(*s*) In Stewart and Turner, cited, the question was not with singular suc-

contained in the lease, to retain the rents for specified meliorations is binding on a singular successor.¹

1191. How may the extinction of leases be effected?

(1.) By expiration of the term of endurance and removal of the tenant.

(2.) By forfeiture under the Act of Sederunt, 14th December, 1756, in consequence of the tenant having fallen two full years' rent in arrear, the irritancy being declared in an action at the landlord's instance before the Judge Ordinary.

(3.) Where the tenant shall have deserted his possession, and left the lands uncultivated at the usual season, or shall have fallen one year's rent in arrear, he may, in virtue of the above mentioned Act of Sederunt, be ordained by the Judge Ordinary, at the suit of the landlord, to give security within a certain limited time for the preceding arrears, and for the rent of the five following crops, if the tack shall subsist so long, or during the currency of the tack, if it be of shorter endurance, and upon the tenant's failure, he will be decerned to remove at the next term corresponding to that at which he entered to the lands(*t*) as if the

¹ Arbuthnot, M. 10424 ; Stewart, 12th Nov. 1834, 13 S. 4 ; Turner, March, 1835, 13 S. 633.

cessors, but with heritable creditors in possession of the estate, which was not equal in value to the amount of their debts ; but the general principle applicable to the cases is the same. The rule, however, is not exactly as stated in the answer. In Turner, the claim was made under a letter written, not by the granter of the lease, but by his heir, and, as it was alleged, though the judgment did not proceed on that, after he had executed a trust-conveyance of the estate for creditors, and the claim was disallowed ; but in another branch of Stewart, reported 12th Nov. 1834, 13 S. 7, where a lease, under which the tenant was entitled to meliorations at its expiry, was during its currency superseded by a new lease at a much increased rent, which stipulated that at its expiry the tenant should be allowed the value of meliorations made under both, it was held, in a question with heritable creditors in a ranking and sale, that the tenant was entitled to retain the latter rents under the new lease in extinction of the sum due for meliorations under both. There seems therefore to be no objection to the stipulation being in a writing separate from the lease if it is so connected with it as to form part of the title of possession. See observation per Lord Medwyn in Turner, cited.

(*t*) The words of the Act are, "to decern the tenant summarily to remove and to eject him in the same manner as if the tack were determined and the tenant had been legally warned," &c.

years of the lease were expired, and the tenant had been legally warned.

(4.) By forfeiture in consequence of the tenant have incurred a conventional irritancy; as the tenant's bankruptcy, where such is made a stipulated forfeiture of the lease.

(5.) By failure of the subject let; as, in a mineral lease, the exhaustion of the minerals. [Gowans, 11 M.P. (H. of L.), 1 Shotts Iron Co., 8 R. 530.]

(6.) By the mutual consent, either expressed or implied. But either party may resile, unless the consent be in writing.¹

1192. What is the procedure in removing under a formal lease?

(1.) The landlord gives the tenant notice to remove forty days before the expiration of the term of endurance; or where the lease has a separate lease, at least forty days before the lease first in date, by causing to be delivered to the tenant, or to be left at his dwelling-house, or to be transmitted to his known address through the post, previous to the commencement of the forty days a notice by a sheriff-officer of the county, or a messenger-at-arms in the form of Schedule I (Sheriff-Court Act, 1853).

(2.) A certificate is endorsed on the lease, or on an extract thereof, that notice has been duly given, signed by the officer or messenger, and attested by one witness, in the form of Schedule J. or an acknowledgment to that effect is indorsed thereon by the tenant himself, or by his known agent.

(3.) Such notice having been given and certified, the lease, or an extract thereof (which is declared to have the same force as an extract decree of removing obtained in an ordinary action) along with a written authority signed by the landlord or his factor or agent, is "a sufficient warrant to any sheriff-officer or messenger-at-arms of the county, within which such heritages are situate, to eject such party in possession on the elapse of the term of endurance, and to return an execution thereof in common form." But the removal or ejectment must be carried through within six weeks from the expiration of the term of endurance; or, where the lease has a separate lease, within six weeks from the lease last in date.²

¹ Ersk. 2, 6, 44; Bell's Prin. 1271; Jur. St. i. 567.

² 16 & 17 Vict. c. 80, § 30.

1193. What is the procedure in removings where the lease is improbative?

(1.) The landlord raises an action of removing against the tenant before the Judge Ordinary of the county where the lands lie; it being competent to raise the summons at any time, provided there be an interval of forty days between executing the summons and the term of removal; or, where there is a separate ish as regards lands and houses, or otherwise, between the date of executing the summons and the ish first in date.¹ Upon the calling of the summons, the Sheriff decerns in the removing; and the decree is followed up after the term of removal by a precept of ejection within forty-eight hours;²(u) or,

(2.) The landlord may use the order prescribed by the statute 1555, c. 39, being by precept in his name executed against the tenant personally, or at his dwelling-house, and also on the ground of the lands, and at the parish church, before the term of Whitsunday of the year in which the lease expires; followed by an action of removing before the Sheriff or the Court of Session.³

(3.) Where the tenant has granted a letter of removal in the form of Schedule K (Sheriff-Court Act), such letter has the same force as an extract-decree of removing against him, or the party in his right as tenant; and such letter is "a sufficient warrant to any sheriff-officer of the county to remove and eject such party from the subject let on the elapse of the specified term or terms, and to return an execution thereof in common form." But where the letter bears date more than six weeks before the term of removal, or the ish first in date specified in the letter, forty days previous notice to remove must be given, and certified or acknowledged in like manner as is required in the case of removings under a probative lease; and no removal or ejectment is compe-

¹ 16 & 17 Vict. c. 80, § 29.

³ Bell's Prin. 1267.

² Bell's Prin. 1268.

(u) A tenant died about a year before the expiry of his lease; his eldest son did not enter into possession, nor did he intimate before the term of expiry that he intended to take up the lease. Held that an action of removing was well directed against two younger sons who had been in possession, and with whom the landlord had dealt after their father's death, and that they were not entitled to plead that they derived their right from the heir; Wilson, 2nd Dec. 1853, 16 D. 106.

tenant after six weeks have elapsed from the expiration of the term of endurance ; or, where the letter has a separate date, after six weeks from the date last in date.¹(x)

1194. What is meant by tacit relocation ?

Tacit relocation is the implied renewal of a lease for another year, where due notice to remove has not been given.²

1195. In what kind of leases is renewal by tacit relocation excluded ?

(1) In judicial leases ; (2) in leases of pasture fields ; (3) in leases of arable farms for a year ; but the last case is doubtful.³(y)

1196. How does the heir of the holder of an unrecorded lease expedite a registered title under it ?

(1) By general service ; (2) notarial instrument (Registration Act), Schedule C, No. 1 ; and (3) registration of lease and instrument.⁴

1197. How does the heir of the holder of a registered lease complete his title ?

(1) By writ of acknowledgment, Schedule E, No. 1, by the proprietor feudally vest in the land ; and (2) registration of writ *in the register in which the lease is recorded*,⁵ or,

(1) By general or special service ; (2) notarial instrument.

¹ 16 & 17 Vict. c. 80, § 31.

⁴ 20 & 21 Vict. c. 26, § 5.

² Bell's Prin. 1265.

⁵ *Ibid.* § 7.

³ Bell's Prin. 1265 ; More's Notes, 257.

(x) In houses within burgh, the practice is to give notice of removal by employing an officer to chalk the door of the house ; More's Notes, 256 ; Jollie, M. 13865 ; but in the case of houses, there seems to be no particular form of notice required. It may be given verbally (at least where the lease was verbal), and proved by witnesses, or by letter, the delivery being proved ; Lambert, 11th Nov. 1864, 3 M.P. 43 ; Slowey, 2nd Nov. 1865, 4 M.P. 1. Notice must be given not later than 4th April. A letter from the tenant agreeing to remove would also be sufficient.

(y) Professor More says :—" In a lease of coal it is sufficient to give timely notice to the tenant, without a formal warning ;" Notes, 257.

Schedule F, No. 1 ; and (3) registration of the instrument in the said register.¹

1198. How does the assignee of an unregistered long lease expedite a registered title under it ?

(1) By notarial instrument, Schedule C, No. 1, narrating the lease, and deducing the assignation ; and (2) registration of lease and instrument.²

1199. How does an adjudger, or a trustee on a sequestrated estate, complete a title to a registered lease ?

(1) An adjudger,—by recording the abbreviate in the Register of Sasines in which the lease is recorded.³ (2) A trustee on a sequestrated estate,—by expediting a notarial instrument, Schedule F, No. 1, and recording it in the same register.⁴

1200. What is the form of writ by which a party in right of a registered lease constitutes a security over it ; and how may such security be made available to the creditor ?

(1) A party having a registered title to a registered lease may grant an effectual security over it, but in accordance with the conditions and stipulations of such lease, by bond and assignation in security in terms of Schedule B,⁵ and *registration of it in the register in which the lease is recorded.*⁶ (2) The security may be made available, 1st, by a sale of the lease, the procedure for a sale under a bond and disposition in security under the Heritable Securities Acts,^(z) being made applicable to a sale of a recorded lease under a bond and assignation in security ;⁷ or, 2nd, in default of payment of the capital sum, or of a term's interest for six months after the capital or term's interest (a) shall have fallen due, the creditor may, under a warrant obtained from the Sheriff, after intimation to the lessee and the landlord, enter into possession of the lands leased, and uplift the rents from sub-tenants, and sub-let the lands ; and until the creditor enter into possession he

¹ 20 & 21 Vict. c. 26, § 8.

⁴ *Ibid.* § 11.

⁶ *Ibid.* § 1.

² *Ibid.* § 5.

³ *Ibid.* § 10.

⁵ *Ibid.* § 4.

⁷ *Ibid.* § 20.

(z) It is only the 10 & 11 Vict. c. 50, that is so made applicable.

(a) Or term's annuity.

is not personally liable to the landlord in any of the obligations and prestations of the lease.¹

1201. How does the heir of the grantee of an unregistered assignation, or bond and assignation in security, complete his title, the lease itself being recorded?^(b)

(1) By general service; (2) notarial instrument, Schedule F, No. 1, in the case of an unregistered assignation, or Schedule F, No. 2, in the case of an unregistered bond and assignation in security; and (3) registration of the assignation (or the bond and assignation in security), with the notarial instrument, in the register in which the lease is recorded.^{2(c)}

1202. How does the heir of the grantee of a registered assignation complete his title?

(1) By writ of acknowledgment, Schedule E, No. 1, by the proprietor vest in the lands leased; and (2) registration of the writ in the same register;³ or

(1) By general or special service; (2) notarial instrument, Schedule F, No. 1; and (3) registration of the instrument in the same register.^{4(c)}

1203. How does the heir of the grantee of a registered bond and assignation in security complete his title?

(1) By writ of acknowledgment, Schedule E, No. 2, by the party appearing on the register as in absolute right of the lease; and (2) registration of writ in the same register;⁵ or

(1) By general or special service; (2) notarial instrument, Schedule F, No. 2; and (3) registration of the instrument in the same register.^{6(c)}

¹ 20 & 21 Vict. c. 26, § 6.

² *Ibid.* § 9.

³ *Ibid.* § 7.

⁴ *Ibid.* § 8.

⁵ *Ibid.* § 7.

⁶ *Ibid.* § 8.

(b) It will be observed that it is only after a lease "shall have been recorded as herein provided," and by the party in right thereof, "and whose right thereto is recorded in terms of this Act," that it can be assigned, either absolutely or in security, in the manner and to the effect provided in the Act. See §§ 3 and 4.

(c) In these several cases a general disponee makes up his title in a similar manner, the general disposition in his favour coming in place of the heir's service; 20 & 21 Vict. c. 26, §§ 8 and 9.

SUPPLEMENTARY QUESTIONS.

[1204. Enumerate the provisions of § 1 of the Married Women's Property (Scotland) Act, 1881.

(1.) Where a marriage is contracted after 18th July, 1881, and the husband shall, at the time of the marriage, have his domicile in Scotland, the whole moveable or personal estate of the wife, whether acquired before or during the marriage, is, by operation of law, to be vested in the wife as her separate estate, and not be subject to the *jus mariti*.

(2.) Any income of such estate is to be payable to the wife on her individual receipt or to her order, and to this extent the husband's right of administration is to be excluded; but the wife is not to be entitled to assign the prospective income, or, unless with his consent, to dispose of such estate.

(3.) Except as in the Act after provided, the wife's moveable estate is not to be subject to arrestment, or other diligence, for the husband's debts, provided that the said estate (except such corporeal moveables as are usually possessed without a written or documentary title) is invested, placed, or secured in the name of the wife herself, or in such terms as clearly to distinguish the same from the estate of the husband.

(4.) Any money, or other estate of the wife, lent or entrusted to the husband, or immixed with his funds, is to be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the value thereof after but not before the claims of the other creditors of the husband for valuable consideration have been satisfied.

(5.) Nothing in the Act is to exclude or abridge the power of settlement by antenuptial contract of marriage.]

[1205. What are the provisions of the Act, as to rents of heritage belonging to the wife in a future marriage?

Where a marriage is contracted after the passing of the Act the rents and produce of heritable property in Scotland belonging to the wife are no longer to be subject to the *jus mariti* and right of administration of the husband, § 2.]

[1206. What are provisions of the Act as to marriages entered into before it?

(1.) Its enactments are not to apply where the husband has,

before the passing thereof, by irrevocable deed or deeds, made a reasonable provision for his wife in the event of her surviving.

(2.) In other cases the provisions of the Act are not to apply except that the *jus mariti* and right of administration are to be excluded to the extent respectively prescribed by the preceding sections from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of the Act, § 3.

(3.) It is to be competent to all persons married before the passing of the Act to declare by mutual deed that the wife's whole estate, including such as may have previously come to the husband in right of his wife, shall be regulated by the Act, and upon such deed being registered in the register of deeds at Edinburgh or in the Sheriff-Court register of the county or counties in which the parties reside, and being advertised in the manner provided in the Act, the said estate shall be vested in her, and subject to the provisions of the Act; provided that the said estate (except such corporeal moveables as are usually possessed without a written or documentary title) is so invested as to be clearly distinguishable from the estate of the husband. No deed under this provision is to be effectual as against any obligation of the husband prior to the date of advertisement and registration of the deed, § 4.]

[1207. What are the provisions of the Act as to the moveable succession of married women?

(1.) After the passing of the Act the husband of any woman who may die domiciled in Scotland is to take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate, according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be, § 6.

(2.) After the passing of the Act the children of any woman who may die so domiciled are to have the same right of legitim in regard to her moveable estate which they have according to the law and practice of Scotland in regard to the moveable estate of their deceased father, subject always to the same rules of law in relation to the character and extent of the said right, and to the exclusion, discharge, or satisfaction thereof, as the case may be, § 7.]

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